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CAROLINIENSIS.

Gibbons v Ogden 9 Wheaton
Emmets, Hoakley's arguments.

THE following Numbers originally appeared in the CHARLESTON MERCURY, *and are now re-published at the desire of many persons, who think, that they are of too much interest to remain scattered over the columns of many Newspapers. The Editor has taken the liberty of making a few trifling alterations, which, he hopes, the Author, (whoever he may be) will readily excuse. The principal alterations, are such, as were necessary in the change, from a Newspaper to a Pamphlet form, and in none of them, has the sense, or the style, been in the least degree varied.*

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Carolinensis.

NO. 1.

A PAMPHLET has just been issued from the press of Mr. SEBRING, entitled "The opinion of the Hon. WILLIAM JOHNSON, delivered on the 7th of August, 1823, in the case of the arrest of a *British Seaman* under the 3d section of the State act, entitled '*An Act for the better regulation* of free negroes and persons of colour, and for other purposes,' passed in December last."

It may not be generally known, that HENRY ELKISON, the above named seaman, who is styled a British subject, is a *mulatto*. But whether he was born in the island of Jamaica, as stated by himself, or whether he be some fugitive slave from a Southern State, it would puzzle any of us to say. His captain, it seems, had known him several years, as sailing out of Liverpool; but there was no proof, excepting the prisoner's own affidavit, that he was born in Jamaica. In this state, a black cannot make an affidavit. Admitting, however, that he was born in Jamaica, still that circumstance does not make him a British subject. In Jamaica, "the only descendants of negroes by white people, entitled by birth, to all the rights and liberties of white subjects, are such, as are *above* three steps removed in *lineal digression from the negro venter*. All below this, whether called Mestizoes, Quadrons, or Mulattoes, are deemed by law Mulattoes." Thus then it appears, as clear as noon-day, that HENRY ELKISON, if he were at this day in the island of Jamaica, would by reason of his not being one degree removed from the negro ancestor, be deemed by law, incapable of enjoying the privileges of a British subject; and how a man, who, by the laws of that island, might, perhaps, be subject to be tried by the ne-

gro act, by justices and freeholders, as is the law here, can be transformed, into a *bona fide* British subject, without being naturalized by an act of Parliament, I am yet to learn. That a negro is free, as soon as he sets his foot on the soil of England, so far, as to be beyond the *power of his master*, we all know to be the case; but this circumstance makes him no more a British subject, than it would make the writer himself a British subject by going to that country.

The view of this case, however, cannot be materially varied, whether we regard him, as entitled in Jamaica, to the civil rights of the whites, or not. The moment he touches the soil of Carolina, he is as much subject to our police regulations, and to all the disabilities of his race, as if he had been born in this city. This has been the law of South-Carolina from her earliest history. The different statutes which impose these disabilities, and which, at the same time, make slavery, the fundamental policy of the state, are not of recent date. Some of them have existed near a century. They are all of *British* origin, and since the Independence of the United States, they have never received any alterations or amendments, which have not recognized the same spirit and the same principles.

Henry Elkison then, a mulatto, as dark as any in his Majesty's West Indies, comes into this port contrary to law. He is arrested by the Sheriff, for the purpose of being confined in jail, until the vessel in which he came, shall be ready to depart the state. He applies to a Judge of the United States Court, for an *habeas corpus ad subjiciendum*, and should he fail in that motion, then for the writ *de homine replegiando*. The Judge hears the case, and in a very elaborate opinion, after many observations and arguments, which irresistably lead the reader to suppose, that he is about to discharge the prisoner, he suddenly comes to a conclusion. First, that he has no power to grant the *habeas corpus:* and, secondly, that as to the writ *de homine replegiando*, it was a matter of course to any citizen. That he had no power to refuse it, but hints *extra* judicially, that though it would certainly lie against the *vendee* of the Sheriff, he had serious doubts whether it would be against the Sheriff himself, suggesting, at the same time, that the proper remedy for this *black seaman*, would be *trespass for false imprisonment* (my blood freezes

at the thought) against the Sheriff. The Judge finally extends no relief to the prisoner, but leaves Henry Elkison exactly where he found him, namely, in the hands of the Sheriff, comfortably lodged in the jail of the district, where he will quietly remain until the ship Homer, which brought him into this port, shall be ready to sail.

That the Judge's final conclusions were correct, no one, I believe, is disposed to deny. His opinion so far, must give general satisfaction. But why his Honor should, *extra judicially*, give his opinion upon so delicate a subject, as that which necessarily involves a question of collision between the State and General Governments, when he might so easily have avoided it, and when his opinion rested on grounds entirely independent of such considerations, must be a matter of surprise to most persons. There was not the least necessity for his deciding upon the *constitutionality* of the State Act. Still less was it necessary, for him, to introduce such a mass of extraneous matter as is contained in this opinion, and therein to depict in colors, the most odious and frightful, an enactment of the Legislature of his native State, than which none can possibly be more important, as none certainly will conduce more to the quiet and good order of the State. The case before him, lay in the narrowest compass possible. The merits of the motion were in a nut-shell. He denies the *habeas corpus*, because the 14th section of the Judiciary Act of the United States *expressly* restrains him, and he decides, he is not at liberty to refuse the other antiquated writ, *not* because the State Act was unconstitutional, but because, being a writ *in favorem libertatis*, the petitioner might sue it as a matter of course, as he could any other writ.

Here, then, was an admirable opportunity for any man, who enters into the sympathies and feelings of his fellow-citizens, (and they are holy sympathies) to have steered clear of a subject, on which, whatever might have been his private opinion, there was not the least necessity for expressing it. This opinion formed no part of the grounds of his decision. His duty I aver, did not necessarily demand from him, any consideration of the question of constitutionality. Neither was it a part of his duty to reflect upon the Legislature, or to hint what he conceives to be an untimely "*exhibition of legislation and zeal*" acting by means and measures, which he

makes out by an ingenious mode of reasoning to be absurd in the extreme. As he could give *no* relief, or take *no* jurisdiction, why not have stopped prudently at this point. As his grounds were purely legal, nothing would have been easier, than to have expressed his unwillingness, to enter upon a question, which, at all times, and under any circumstances, must be painful to any Judge, or to any man who is born in the Southern States.

It may be said, that the Counsel for the prisoner, took the ground of the State having transcended its powers in passing the Act. This is true. But the Judge is not bound to notice arguments of Counsel, of which the question is unembarrassed. More especially, when, by so doing, he would have to express sentiments and opinions, which I hope and trust, will for ever be uncongenial to the citizens of this State—sentiments and opinions, which never can do the least possible good, but the publication of which may be productive of serious and incalculable mischief, to the particular community in which we live.

NO. 2.

I HAVE stated, that much of Judge JOHNSON's opinion, was unnecessary and irrevelant, and I have hinted, that the extraneous matter contained in it, was improper for publication. It has been said, and I believe, upon undoubted authority, that this opinion was in the hands of the Editor of one of our Gazettes, who respectfully suggested to the Judge his doubts as to the propriety of giving it more publicity than it had already received, and who finally declined inserting it in the columns of his paper. The opinion, however, now appears in a pamplet form and is advertised for sale. By whose authority it is published does not appear. Like any other pamphlet, I presume, every citizen who purchases it, has a right to remark upon it, without being charged with disrespect to the Court. It is far from my intention to withhold from the Judges of the land, the respect due to their sacred characters. In the pure and upright administration of justice, is to be found not the form, but the very substance of

rational freedom. Their decisions on subjects referred to them, must, and I trust, will forever be held sacred. I am sensible that no one has a right to canvass or discuss them in the columns of a newspaper; and, so determined am I, to adhere to this course, that nothing would induce me, whatever might be my opinion, to remark upon an opinion of the Bench, judicially delivered. But such parts of a Judge's opinion, as are *extra judicial*, (and I hold every thing to be extra judicial which does not form a ground of the decision) I do deem to be a fair and a fit subject of criticism and remark. Added to this, when a law of the State, in which I live, and may probably die; I and my friends and relatives, all most dear to me—a law which the Legislature of our country deliberately passes, to secure the quiet and security of us all, is animadverted on with severity, and such a view taken of all its wholesome provisions, as has a tendency to bring my country into contempt at home and abroad—when this view forms no part of the *legal* or *other* grounds of the decision—when sentiments of this tendency are uttered from the Bench, which the case before the Court does not demand, I conceive I have the right, and it is a right which as a freeman of South-Carolina I will always exercise, to remark freely upon any decision thus circumstanced. It is as much my duty to vindicate my country, from what I conceive an unprovoked and unmerited imputation cast upon her extra judicially, from the Bench, as if it came from any other quarter.

The most prominent part of the publication before us, is the commencement of the Judge's view of the State Law. The Judge says—"The object of this law, and it has been "so acknowledged in argument, is to prohibit ships coming "into this port from employing *colored* seamen,* whether "citizens or subjects of their own government or not. But "if this State can prohibit Great Britain from employing her "colored subjects, (and she has them of all colors on the "globe) or if at liberty to prohibit the employment of her "subjects of the African race, why not prohibit her from "using those of Irish or of Scottish nativity; if the color of "his skin is to preclude the Lascar, or the Sierra Leone sea-"man, why not the color of his eye or his hair exclude from

* The words of the Act are "*persons of color.*"

" our ports the inhabitants of her other territories? In fact it " amounts to the assertion of the power to exclude the sea- " men of the territories of Great Britain, or any other nation " altogether. With regard to various friendly nations, it " amounts to an *actual exclusion in its present form.* Why " may not the shipping of Morocco or of Algiers *cover* the " commerce of France with this country, even at the present " crisis? Their seamen are all colored, and even the State of " Massachusetts, might lately, and may perhaps now, expedite " to this port a vessel, *with her Officers Black*, and her crew " composed of Nantucket Indians, known to be amongst the " best seamen in our service. These might *all become slaves* " *under this act.*"

What I ask is the meaning of the foregoing sentences? It is neither more nor less, than that the law in its present form, that is, in forbidding the ingress of "*persons of color*" excludes the subjects of Morocco and of Algiers and the Nantucket Indian seamen from coming to our shores. That all these persons, in a word, would be liable to be seized under the Act, as *persons of color*, and sold as absolute slaves. If this be not the clear meaning of the Judge, or if it is possible, for human ingenuity, to annex to his words any other meaning, then, the simplest and the plainest words in our language have no signification, and there is no longer use for a language The words of the Judge are emphatic—" With regard to various friendly nations," says he, " it amounts to an *actual exclusion* in its present form." What, amounts to an exclusion? The Law in its present form. Exclusion of whom? The friendly Moors and Algerines, and also the Nantucket Indians, who might now be on their way hither. These, says he, might *all become* slaves under this Act.

Here then is an opinion, *extra* judicially expressed, that under our Law in its present form, the Moor, the Algerine, and the Nantucket Indian sailor, may be taken up as persons of color and sold as slaves. This opinion, in a pamphlet it must be remembered, is not to be confined to Charleston. It will probably go to Washington, and from thence to the British Cabinet, after going the rounds of the Northern States.— Will not then our State abroad suffer in her reputation, when this is declared to be the law of this land? Is not the very assertion calculated to produce, in Massachusetts, the greatest

possible feeling and excitement against us, when a Judge from the Bench of the United States, tells them, that their Indian seamen of Nantucket, whom he values as amongst the best seamen in our service, may, on their landing here, be taken and sold as slaves? But how, my fellow-citizens, stands the fact? The assertion I aver, is destitute of foundation. It is an unprovoked and unmerited reflection on the State. It is a libel on our jurisprudence and our laws, for any man to assert, be his station or character what it may, that any of the above named persons could be seized as persons of color.—I do sincerely believe, that since Carolina was first settled, it never was heard of, or supposed, that any person could be subject to our laws but the descendants of negroes. A free North American *Indian*, a Lascar, an East Indian, a Hindoo, or a Moor, may traverse our streets unmolested by the patrol or night guard; may give evidence in our courts of justice, and claim the same right to trial by jury, &c. as our white citizens can claim. It was only the other day, that a *Lascar* in this city, gave his evidence in our State Court, on a criminal prosecution against a white man. Our Courts have decided, that none of these persons, (particularly free Moors) were ever contemplated as coming within the meaning of our laws to regulate the conduct of our negroes, or persons of color. Every day persons of color, whose blood, on the mother's side, is Indian, are exempted from the state tax imposed upon persons of color, and allowed many of the privileges of white men. There is not a student of law; there is scarcely a citizen, who is ignorant, that the only persons not black, who come under the operation of our negro acts, as they are called, are Mulattoes and Mestizoes, and their descendants. Even Mestizoes are exempted occasionally, on proof of the mother being a free Indian. The maxim of the civil law, *partus sequitur ventrem*, is expressly incorporated into our *code noir* by a very old statute, and forms the foundation of the distinction in all these cases. The term "persons of color," is a term of as settled signification and import as any to be found in our laws, or in common parlance. It is a term in general use all over the West-Indies, and is never applied to any persons but those of *mixed blood*, and who are *descended from negroes*. The different classes and varieties are differently discriminated in the different islands. According to Bryan

Edwards, than whom there cannot be a higher authority, persons of color are known in the British West-Indies by the names of *Samboes*, *Mulattoes*, *Quadroons* and *Mestizoes*.—Among the Spaniards, the distinctions are nicer, and more numerous. Don Antonio de Ulloa, in his description of the inhabitants of Carthagena, ranks them as *Mulattoes*, *Terce-rones*, *Quarterones*, *Quinterones*, &c. &c. The French also have their distinctions, which do not vary considerably from the British or Spaniards. But in each, and all of the islands, all these persons are comprehended in one class, and this class, by general consent, is called, "*people or persons of color*." It is a *generic* term, the most comprehensive that can be used, because it includes the descendants of negroes to the thousandth generation. Our Legislature has used it of late familiarly, no doubt for the very reason, that as it is the most comprehensive, embracing all the varieties of the Mulatto tribes, so it must be the most appropriate.

How strange then, that a Judge of the United States, who has been bred at our bar, and who ought to know the decisions of our State Courts, and the meaning of a term in such use in all states in which slavery exists, much better than the humble unaspiring writer of these lines; how strange, I repeat, is it, that it should be proclamed from his seat on the Bench, that a Lascar, that a Moor, and last of all, that a *Nantucket* Indian seaman, in whose veins flows the blood, not altogether of Pocahontas, of which John Randolph is so proud, but the blood of the aboriginal of the forest, pure and as free as the air which he breathes, can be taken up in South-Carolina as a person of color; and, without the form of a trial, sold and deemed a slave forever. Shall an assertion so groundless as this; shall an imputation so dishonorable, go forth with this pamphlet to the world as the law of South-Carolina? Never, I trust, whilst a pen can be wielded by CAROLINIENSIS.

NO. 3.

THE Judge, in the pamphlet before us, not satisfied with giving the dreadful picture of South-Carolina legislation presented in my last number, takes another view of the State

Act equally as odious. He tells us, that the offence for which the colored seaman is to forfeit his freedom, is simply, that of coming into port in the capacity of a seaman—that if the captain refuses to carry him away agreeably to the directions of the Act, or is desirous, from caprice or selfish motives, to doom him to slavery, that it is in his power so to do—that he then, without the form even of a trial, becomes an absolute slave, though his removal from the State depends not on himself, but on his captain—that the forfeiture of freedom is incurred by the single act of coming into port, and this even though driven in by stress of weather, or forced by a power which he cannot control, into a port for which he did not ship himself. The law, says the Judge, contains no exception to meet such contingencies.

A miserable portrait, indeed, is this of Carolina legislation, and of Southern policy! A poor hard-working mariner, after braving the dangers of the ocean; after hair-breadth 'scapes from pirates and murderers; after encountering hardships in every form, comes into our port hitherto so hospitable, or is driven hither by the merciless winds and waves, with his little treasure, and his hopes stranded on the sands. In either event, says our Judge, "if his captain finds it his interest or his pleasure to get rid of him and of the wages due him, his fate is suspended upon the captain's caprice in this particular," and he may be sold as a slave. Can this be so, my fellow-countrymen? Is there such a law on our statute book? Is there no relief? The Judge says none. Forbid it Heaven! I would not live in a country so palpably and barbarously unjust. What! To have a man's liberty cloven down, because shipwreck has cast him out upon us. The Arabs of the Great Desart, described by Riley, are not worse than this—*their* captives *have* a Herald of Mercy at Mogadore.

> *"Is there not some hidden curse,*
> *Some chosen thunder in the stores of Heaven*
> *Red with uncommon wrath"*

to blast the land that would deal so cruelly with the sons of misfortune. But it is not so. There is not, my fellow-citizens, the least ground for such an opinion. To give such a construction is not to do violence to the intentions of the men

who framed this law, for it is known they had no such intention; but it is an act of gross injustice to them, to say that their words have any such meaning.

The mistake into which the Judge has precipitated himself, is to my mind clear and obvious. It does not appear, that he had before him any other Act, than the Act of the last session, Dec. 21, 1822, for I do not perceive that he makes a single remark on the Act of Dec. 20, 1820. To see the real intentions of the Legislature, the two Acts must be taken in connection. They cannot possibly be separated in the case before us, if a right construction be desired: for though it be true, as stated by the Judge, that on the refusal of the captain to carry away the colored seaman, he becomes subject to a fine, and the negro is to be sold as an absolute slave; yet it is manifest that he cannot be sold but in conformity to the provisions of the Act, passed Dec. 20, 1820. The words are "*and sold in conformity to the provisions of the Act passed on the 20th Dec. 1820, aforesaid.*" The connection then, between the two Acts, is now evident. He is to be sold in conformity to a previous Act. What are the provisions specified in this Act of 1820? They are specified and are these:—"Any free negro or person of color coming into the State, contrary to the Act, is to be apprehended and carried before a magistrate, which magistrate examines him and orders him to leave the State. If, after such an order, he remains in the State longer than fifteen days, or having left the State returns to the same, (unless it be *in consequence of shipwreck*, or some *unavoidable* accident) upon proof of his so returning, he is subject to a fine of twenty dollars, and in default of payment may be sold after ten days notice, for a term not exceeding five years; and this penalty is to be repeated, if he does not depart within ten days after payment of the fine, and so on." The Act of 1822 increases the penalty in the case of seamen, so far as to direct an absolute sale instead of a sale for a term of years, probably on account of the greater facility afforded to these people in coming here. But, in every other respect, the provisions to be complied with are the same. They are plain and specific; and how a construction to one Act could be given without taking up the other, is not for me to say.—Had the Judge considered the two Acts in connection, for

the reasons above stated, he also would have seen, that the case of shipwreck is provided for. But admitting that nothing was said of unavoidable accidents, can it be contended that a man driven upon our coast by a storm, can be said to migrate, or arrive here, or that "*a vessel can be said to come into the port*," within the meaning of the Act. To use against him, the Judge's own words, in another place—"It is not too much to say, that it will not bear argument." It is to tear up root and branch, every accustomed rule of construction.

I think then, I have shewn, that our Legislature have not been so stupid and careless, or even so unreflecting, as those who may read the Judge's pamphlet may suppose. If the Judge has not seen the law in the light that it was viewed by those who framed it, I think I have shewn, that the fault was not theirs, but his.

The Judge in his opinion, goes on to treat the Act in question, as manifestly absurd in its provisions, and as defeating its own ends. He says—If the policy of the law be, to keep persons of color from holding communion with our slaves, it pursues a course inconsistent with its object, because, says he, the *penalty* which it inflicts on those who come here contrary to law, is to *domesticate them*, by being *sold here*, and thereby introduce the *very wild beasts* into our streets, that we were anxious to keep out. This mode of reasoning, I confess, is as novel to me, as it is ingenious. I suspect, that neither the Judge, nor I, will ever live to see an example of it in practice. To suppose, that amongst the many hundreds of colored people, who come to this port from the North, and elsewhere, as stewards, cooks, and mariners, all of them, no doubt well disposed to enlighten the benighted minds of our slaves upon certain subjects, and most of them prepared and instructed to do so, by the fraternity they leave behind them; to suppose that these people, who are in the enjoyment of liberty, the liberty too, of going to and fro without molestation, in employments peculiarly suited to their habits and inclinations, should willingly incur the high penalty of *slavery*, *merely*, as the Judge says, that their facilities of doing mischief might be thereby increased, is to look for that, which probably never will happen, until some great revolution in the nature of man shall take place, certainly not in my power

to foresee, however it may be within the prescience of others, better gifted than myself. With all due deference to this opinion from the Bench of the United States, thus extra judicially expressed, I would say, that this is a species of *domestication*, which the colored citizens of theNorth, would rather be excused from accepting, upon any terms; and I would add, with deference to the same authority, that the Legislature of South-Carolina have rather a better knowledge of these matters than some folks are willing to allow them. The Act, I think, an excellent Act, admirably adapted to attain its end and object. It is now in full operation, and I understand from those who ought to have some knowledge of the subject, that the strict execution of this Act, is at this moment producing the happiest effects in our community; and that the probability is, that in a few months, perhaps weeks, the intercourse which is now maintained with the North, through this most dangerous class of strangers, will be entirely at an end.

NO. 4.

I PROCEED to vindicate the Legislature from another charge *extra judicially* made by the Judge, in the opinion, or pamphlet before us.

In the third page he says—"I felt confident, that the Act had been passed *hastily* and without *due considcration*,"—and again in the eleventh page—"I am firmly persuaded, that the Legislature of South-Carolina, must have been surprised into the passing of this Act." Now, let me call the attention of my fellow-citizens to the peculiar circumstances under which our Legislature last met at Columbia. The occurrences of the last summer are too well known to be dwelt on in this place. The sensibility which those occurrences produced, had not subsided at the meeting of the Legislature. On the contrary, many circumstances conspired to increase it. A memorial from this city, couched in strong language and suited to the crisis, demanded of the constituted authorities a new and more vigorous policy. The delegation from the city had been previously convened, that by a proper un

derstanding, their efforts should be more systematical, and of course more successful. The Governor made these occurrences the subject of a distinct message, well remembered.—The members in fact, met under feelings of a peculiar character, and the sense, that something ought to be done, was general, not in our community only, but in the State at large. Under the influence then, not of passion, or undue excitement, but of a temperate, a settled and a deliberate conviction, in the minds of all, that our code must be revised, and our laws amended, the Bill was introduced, which has since become the subject of the Judge's animadversion. This Bill, I remember, was before the House near ten days. Clause by clause was discussed with a spirit and an eloquence suited to its importance; mail after mail brought to us the eventful proceedings of the House, and the notices of the sentiments, and the speeches of the members; *and yet*, the author of this pamphlet before us, undertakes to assert, and *with confidence too*, that the Legislature of his country, acted *hastily*, *and without due consideration*, and that they *must have been* surprised into the passing of the *very act*, the consideration of which was the subject of animated discussion, and occupied so great a portion of their time. Is this treating the Representatives of the State with a respect due to their characters, and to the high and important business upon which they were convened? But this is not all. The author of the pamphlet insinuates and hints, that all this was an *exhibition* of legislation and zeal, not demanded by any necessity *he* could see. After making out all the provisions of the law to be absurd, and the Act a *felo de se*, he says—"On the fact of the necessity for all this exhibition of *legislation* and zeal, I say nothing. I neither admit nor deny it. In common with every other citizen, I am entitled to my own opinion: but when I express it it shall be done in my private capacity."—Now I beg to be understood, that I would scorn to give a writer's words a construction which is unwarrantable or unfair, for my motive is *public*, and not *personal*. But I ask, my readers, whether by every fair mode of construction, assisted as the passage is by the context of the whole pamphlet, and its distorted views of things, the above be not a *palpable hit* at the Legislature and the community? If it is not an insinuation, that there was *useless legislation* at Columbia

upon the causes of the occurrences of the summer, and *useless zeal* here in Charleston, or elsewhere in the State, what then is it? It clearly must mean something, or it means nothing. To suppose the latter is absurd. Judges are not apt to insert in their *written* opinions to be published to the world, paragraphs which are senseless. If the Judge was of opinion, that all the legislation and all the zeal was right and proper, there could be no harm in thinking, or even in saying so. But if he was so unfortunate (a misfortune truly) as to differ from his fellow-citizens on this subject, there was great need of caution in expressing himself, if he meant to convey the idea that he had a private opinion on that point, different from theirs, but would keep it to himself. But why declare at all that he had an opinion upon such a point, but was unwilling to express it? Nothing in the case called for this observation: no person demanded of him to admit or deny, whether such was his opinion. Who could have dared to do this? It is then, as I conceive, a *palpable* insinuation, reflecting upon the community, and as a citizen of this community, I repel it.—An insinuation is at all times worse than a direct open charge. Is it the tooth of the serpent which inflicts the mortal wound? or is it the deadly poison under its tongue, which insinuates itself into the vital fluid, and stops at once the springs of life?

I will now pass to other parts of the pamphlet, which reflect, as I conceive, upon the authorities of my country, and these consist in extra judicial mis-statements which I propose to correct. The Judge, after giving an account of what passed between himself and the British Consul, and the Northern Captains last winter, (when many arrests of colored people took place under the Act) and of the influence he had over them, in causing them to suppress their complaints, and of his instructing Mr. GADSDEN, the District Attorney, to make application to the State authorities, and respectfully too, (as if Mr. GADSDEN needed any instruction on this head) then proceeds to assert, that on application to the *State* authority, *the men were relieved*, but that the ground of relief was not in its nature *general* or *permanent*. I must be permitted to deny that any relief was ever given by the State authority. In all or most of the cases, as I understand, there was no relief given, if it can be called relief, further, than that the Sheriff on

being importuned, might have used his discretion, in giving up the men some little time before the vessel sailed, or he might have detained some a very short time in confinement: but there was no relief regularly given by any Judge of the land, as I can learn. In the case of the steward of the *Georgia Packet*, Capt. Bunce, which was decided by a single Judge at Chambers, an appeal was made to the Constitutional Court. There was there a difference of opinion, and as all the Judges of the State were not present, there was no judgment pronounced. So that it is yet *sub judice*. Bunce's steward went with the vessel, but was not relieved. He took nothing by his motion. The importance of correcting this mis-statement will be seen by turning to another part of the pamphlet, in which the Judge conveys the idea, that the reason why there were no prosecutions after February, was, that the State officers, after they understood that the law was complained of on the ground of its unconstitutionality, and of its injurious effects upon our commerce, were willing to *let the law go to sleep*, and by way of strengthening this view of the case, he notices the circumstance, of the Attorney General *not appearing* in the present case, in defence of the State Act, and on the opposition to the discharge of the prisoner being conducted by Mr. Holmes, *Solicitor* to the (South-Carolina) Association. Now, I believe, that the true reason why there were no more prosecutions between February and August, was not because the State officers thought the Act improper or unconstitutional, but because the Sheriff, not having the cases reported to him as usual by the Harbor-Master, whose duty it was under the Act to do so, did not feel it incumbent on him to proceed any further; and the reason why the Harbor-Master discontinued his reports to the Sheriff, simply was, as I understand, that he was a *City* and not a State officer, and felt reluctant to perform a duty imposed on him, for which no compensation was provided by the Act.

As to the Attorney General's not appearing on the occasion in defence of the State law, it certainly was not his duty so to do, until called upon for that purpose. If any person had a right to make a call on him for his services and assistance, it certainly was the Sheriff. Did the Sheriff demand of him his assistance as counsel? I do understand not. Then how can it be said, that the State officers were willing to let

the matter sleep. The law, it is true, did go to sleep, and it slept for the same reasons, that many other laws upon the the same subject sleep. They sleep, because the officers (I mean no offence) whose duty it is to enforce them, neglect so to do. As to Mr. HOLMES' conducting the opposition to the discharge of the prisoner, the Judge neither knew, nor could he know, that he appeared otherwise, than as he himself stated in Court. The South-Carolina Association was not before the Court; had not been there named by any one, and the Judge had no more right, in his written opinion, to call Mr. HOLMES, Solicitor to the Association, than he had a right to call out the names of any other officer of that respectable Society of citizens. Some of my readers, may think, that I am noticing a trifling circumstance, in saying, the Judge had no right to call names in Court, of persons not before him, in any of the proceedings. But they will cease to think so, when they recollect, that the sentiment improperly ascribed by the Judge, to Mr. HOLMES, (as will be shewn hereafter) may without much difficulty be put upon the Association. As I regard this Association as an useful body of men, having no other views, than to aid the execution of the laws, and, as my object in these essays is, to vindicate my country, and its laws, and any of the institutions connected with its peace and happiness, I could not pass unnoticed, a circumstance, which ingenuity might convert into a reflection on that band of patriots and of gentlemen. This tribute is due from one, who knows personally most of its members, and would gladly be enlisted under their banners.

I come now to the sentiment ascribed by the Judge, to Mr. HOLMES, *eo nomine*. This sentiment, (in the concluding paragraph of his speech) as can be attested by many who heard it, was used altogether *hypothetically*. After drawing a picture of the calamities, which ultimately awaited our State, should she be deprived of the right of prohibiting free persons of color, from migrating and flocking hither, from all parts of the world; after shewing, in a philosophical manner, that the destruction of this species of property was inevitable, and that this property gave strength and stability to the State, he concluded his speech, by remarking, that in the dreadful hour of peril and of trial, which he hoped would never arrive, the people of Carolina, rather, than calmly look on, and see their

lives jeopardized, their houses in flames, their slaves in arms, and their very existence threatened, would see the pillars of the government crumble into ruins. This was the exact sentiment delivered by this young man, and not the one so unqualifiedly stated by the Judge. But now I put it to my fellow-citizens, and to the world, to tell me, in what portion of the habitable globe, in which civilization and refinement reign, or civil liberty rears her head, it was ever required of a Judge, as a part of his duty, to seize hold of a sentiment expressed by Counsel, irrelevant to the point, finally decided, and not censured at the moment, and to make it the subject of a judicial remark, in a written opinion. I protest, my countrymen, against this, as contrary to all rule and all propriety; as unprecedented in practice, as it is unfair in principle: as cruel as it is ungenerous. If, all the sentiments of Counsel, uttered in the warmth of the imagination, in the fervor of declamation, or in the zeal or heat of discussion, are to be stated on the briefs, and remarked on (extra judicially too) in the written opinion of Judges, and blazoned to the world in pamphlets, where is the *Veteran* of the Bar, whose locks are silvered with his years; who is he, into whose mind, prudence and discretion have poured their choicest gifts, that can possibly escape censure? I protest against it, as infringing the privileges of the Bar; as limiting the range of the imagination; as cramping genius, and, as one of the many means, which might be contrived to fetter the intellect of man. Shall the Barristers of the Court, after the manner of the *Locrians* of old, address the Bench, with halters around their necks? Or, shall the walls of the Federal Court Room, be hung with the tapestry, and the pictures of the chambers of the Holy Inquisition, that with racks and tortures before their eyes, the advocates should weigh nicely, as in a balance, their words, before they venture to utter them? Where is the Inquisition, out of Madrid, that can equal this new species of Inquisition—the Inquisition of a Judge's Charge?—Where are the racks and the tortures, however, of new and of patent invention, worse to men of sensibility and honor, than to have their sentiments, often incautiously expressed, circulated in pamphlets, from one extreme of the United States to the other? I aver, that the like of this has not occurred

within the hallowed walls of any Temple of Justice, in any land of freedom.

NO. 5.

It must have been seen, that my object in noticing Judge Johnson's opinion, was to vindicate the State and the community from the aspersions he cast against both. If I have travelled out of the pamphlet, or have touched upon topics not arising out of the subject, and referred to by the Judge, I shall certainly regret it for my own sake. I must never lose sight of the respect I owe to myself. I am, however, not sensible that I have trespassed in the slightest degree. Certainly, "nothing extenuated, nor set down aught in malice." I desire nothing more, than that my readers should have his pamphlet in their hands, whilst they read these essays, and judge for themselves, whether I have ascribed to him any wrong opinions or views not warranted by his own performance. If I have at any time, used *strong* language, it was because the occasion as *strongly* demanded it. Shall a publication be permitted on the one hand, liable from the very nature of its subject, to be misunderstood by one class of our population; and on the other encouraging by opinions unnecessarily expressed, the coloured race of other parts, to persist in coming here contrary to our laws, that they might corrupt our slaves? Shall the circulation of sentiments of this cast and character, be tamely acquiesced in, because they come from the extra-judicial pen of Judge Johnson? Shall the sacred mantle of office cover the indiscretion of the man, or shall station protect him who forgets his duties to the advocate, in breaking down those laws of courtesy which bind the Bar to the Court? Palsied, I say be my heart, and palsied be my tongue, when the one shall not feel at this time, such insults to my country, and the other to proclaim her wrongs. That the volunteer opinion of Judge Johnson, may and will produce unhappy effects, is not a solitary opinion of mine. Every person in the Court room disapproved of it, and there was almost a simultaneous wish expressed in the lobbies, that it should be confined to the place where it was

first delivered. The very circumstance of the Editor of a Public Gazette, declining its insertion in its columns, ought to have put the Judge to the inquiry, whether there might not be some ground for the Editor's opinion, that it was improper for public inspection- Most men, similarly circumstanced, and at the same time entering into the sympathies of their fellow men, after the occurrences of the past summer, would have been thankful for such a suggestion, from one, who, from his habits was fit to judge, and who could have had no wrong motive for his advice. The Judge, however, disregards admonition, and his opinion is with the world.

In the opinion given by him on the merits of the motion for the *habeas corpus*, I most sincerely acquiesce. This I call the *judical* opinion of the Court, and it is entitled to my respect. It will be found from the 12th to the 15th (both inclusive) pages of the pamphlet, with only one exception, and that is, where in half a line, the unconstitutionality of the State Act is declared. With this exception, and with the exception also of the two first pages, which simply comprise a statement of the case, there is not a sentence, or a sentiment in the whole pamphlet, from the beginning to the end, which is not extraneous and irrelevant to any point finally decided by the Court. This I call the *extra judicial* part of the opinion. It is not that the principal portion of this opinion, as it is termed, is irrelevant, but it is offensive, as I trust, I have shewn to the good people of the state. The sentiments are expressed, as one would give them, if he were soured with the community in which he lived. In the view of the Judge, the Legislature acts *hastily* and without *due consideration*. It first permits itself to be *surprised* into the passing of the law, and when it is passed, then in the mind of his Honor, it is not only unconstitutional and void, but it is also *absurd*. In the view *he* takes of the law, if its policy be to keep foreign persons of color from holding oommunion with our slaves, it then pursues a course *inconsistent with its object* and defeats its *own* ends. If it would *keep out dangerous* characters, then says he, it presents the *finest facilities in the world* for those characters to introduce themselves into the *very* situation, in which they would enjoy the best opportunities of pursuing their designs. If, continues he, it would have *wild beasts kept* from us, then it acts so as to

turn them loose into our streets. If it would keep out the *plague*, then it *inoculates* the community with it. If the incendiary, the *fire brand* is put under our houses. It is *studiously* calculated he thinks, to *hurry through its own execution*, so as to leave the *objects of it remediless*. It is unjust—it is incongruous. These are the Judge's ideas, nay his words. It again makes slaves of the friendly subjects of *Morocco* and *Algiers*, and of the fine Nantucket Indian Seamen, *some of the best* he says, *in our service*, without a chance of redemption. Aye, and of poor shipwrecked mariners too! All these, no matter how willing they may be to leave us, may be made slaves in the land of South Carolina, if a captain by his avarice, or his caprice, should chuse it. These are the Judge's extraordinary views, in this most extraordinary performance, called an opinion from the Bench. What series of circumstances, what combination of causes, could bring about in the mind of any one citizen, such unhappy, such oblique and such distorted views of our legislation and proceedings, it must be left for the community to judge. Had it been so, that his Honor in any case which might have come before him, was so situated, as to give an opinion *against his own feelings*, in which his countrymen saw their hopes disappointed, and their prospects darkened, who would have blamed him, for the honest and conscientious discharge of his high and sacred trust? But, when duty does not demand the expression of opinions, which, in their tendency, may be destructive to the interests of the State, who can excuse him? If in his strange conceit, such a matter as a State taking up a few persons of color, could produce collision between this State and the general government, or between the general government, and a foreign power, was it for him to interfere? If the British Consul and the Northern Captains, had complaints to make, as he states, and he could give them no redress, what more had he to do with the business? Is he to counsel them? Is he to assure them "that they should be no more molested." Could he suppose, that his dictum, or the influence of his opinion, could put an end to the operation of a State law? But 'he knows the unfavourable feeling which the Act was calculated to excite abroad,' then, why not at the same time, give some thought

to the situation and feelings of the people at home, amongst whom he lived? If he *would* step out of the line of his duty, to do an act of kindness, why not have had his eye a little to the Citizens of Charleston, as well as interest himself, for the Northern Captains, who are acting for the colored people of the North. If he *would* interpose his advice at all, why not have said to these Captains, as he might have said with propriety and with great truth, that they carry thousands of Southern passengers from this port; that they earn their bread by the custom and the trade of the South; that the facility afforded for mischief by the increasing practice of employing colored cooks, stewards and mariners, was, in this community, a growing evil, and a just cause of considerable alarm,* and as the inconvenience to them, in dispensing with their blacks, was but trifling, compared to the danger to us, in bringing them here, they ought to have some little regard to the feelings of the people with whom they traded, and not press the matter before the State Court. Understand me, I do not say, he ought to have said, thus much, but that if he *did* interfere or give his private opinion *at all*, better to have spoken as a Carolinian, than to take the interest he did, by directing Mr. GADSDEN, the *District Attorney* of the United States, to make applications to the State Authorities, as if it were a matter of any great consequence, whether the blacks of New-York or Philadelphia, (whose hostile intentions must be better known there than here,) were lodged in jail, till the vessels which brought them in should be ready to sail. Would any of the Judges of the King's Bench in England, take the same trouble, or feel the same interest, for a *bona fide white* American Citizen, who having a right to ingress into Great Britain by the Treaty with that power, should be ordered off, by that government, under the Alien Act, lately passed by Parliament.—I should say no.

Every thing which has happened for the last twelve months, ought to have demanded of the Judge, to have entered so far into the general sympathy and public feeling, as to

*The splendid Liverpool Line ship *Canada*, on her arrival from Liverpool discharged her crew in New York, and when she arrived here some weeks ago, her crew before the mast was composed entirely of *blacks*, shipped in New-York for this voyage.

have directed his unofficial advice, (if he would give it,) to the end, which he, as well as the rest of this community, ought ever to be desirous to attain; namely, the exclusion of these characters, who furnish such an important means of communicating to the domestics of the South, the sentiments and opinions, and horrible schemes of their own color of the North. The author of this pamphlet, was born and has lived among us. He has seen attempts frustrated, which had they succeeded, to any extent, would have made this land, the scene of desolation and woe. He has seen thirty-five human beings atone for their diabolical crimes, by the death of the gallows. He has seen them tried by some of the first men in the state, and distinguished for their probity, their honor, and their good sense. He knows their sentence to be approved of by every man, woman and child in the country. If he has heard complaints, he has heard none, but there has been too much forbearance, and that the steps of justice were too sluggish. The sensibility of the city, he has seen extended more or less, over the state. He knows the state, and the progress of opinions in other countries on this subject. He there sees societies, and plans, and projects a-foot, striking as manifestly at the vital interests of the States of the South, as that the sparks fly upwards. He sees a false and affected tone of philanthropy, which, if spread over the vast regions anticipated by their professors, would overwhelm the land of his fathers. He can look no where, that he does not see clouds gathering into storms, and storms threatening to burst upon nations. He sees the colonial interests of the British Empire, about to be immolated on the altars of folly, and every branch of trade connected therewith, about to be surrendered to the fanaticism of a thousand Wilberforces.—He hears the petitions of the colonies. They address their cruel and unnatural parent, to *spare*, and not *like Saturn to destroy her own children*. Let him go over the sections of this confederacy. He finds the self same spirit, under other names, and prompted by other motives, stalking abroad as a pestilence. All the engines, and all the means and machines, which talent, fanaticism, false charity, fashionable humanity, or jealousy, or folly, can invent, are in dreadful operation, and array against the State, which gave him birth. And when the state would look out for a little shelter, from

the impending gust, in the means which God and nature has given every sovereign state and every individual to preserve themselves, the Judge alone, as if he were on a hill, would act and interfere as if there were no cause for alarm:

> "He would bestride our narrow community.
> Like a Colossus; and we petty men,
> Must peep about, under his huge legs,
> To find ourselves dishonorable graves."

Our Legislature have no deliberation, or reflection, for they pass absurd laws. Their means defeat their ends. And as "to the necessity for all this *exhibition* of legislation and zeal" for the year past, the author of this pamphlet has his *private opinion*, but he will *only express it to his friends.*

> "Nay; yet there's more in this;
> I pray thee, speak to me, as to thy thinkings,
> As thou dost ruminate, and give thy worst of thought
> The worst of words."

If prudence be a virtue in domestic life, it should never be neglected by a person in authority. Every sentiment expressed by a great man, produces good or evil consequences; for after all our boasted independence, we rely very much upon the opinions of others. If the chief magistrate of these United States, should express any opinion, upon a subject in its nature calculated to excite the passions of men, however *unofficial* may be the expression of that opinion, it *must* and it *will* cause great excitement. It is the part, therefore, of wisdom, never to proceed a single step beyond what may be required by the immediate case under consideration. But of all men, he who is to dispense justice, should be the last to advance an opinion upon national, much less, international law, when that opinion is not necessarily called for by the subject in dispute. The decision now under review, is *expressly in violation of prudence.* It has covered a ground as extensive as the imagination of the Judge. It brings before the public no less personages than the British Minister at Washington, the honorable the Secretary of State, and a distinguished member of Congress, from South Carolina.—

It arraigns the wisdom of the legislative body, and is calculated to rouse the indignation of the Northern States, by a series of analogies, as revolting to our own feelings, as to those of the people of Massachusetts, or Connecticut. It glances from the *public* officers to a *private* Association, and from the *Attorney General* of the State, to the *Solicitor* of the Association. Every consideration, which would have suggested a decision, as limited as the circumstances of the case would admit, has been by the Judge *entirely* neglected.—A motion is made for a *habeas corpus*, &c. He decides that he has no power to grant it, and, consequently, whether the law of 1822, be, or be not constitutional, was not a subject for the decision of the Court. In deciding, therefore, upon this question, his honor kept not within the line of prudence, but went beyond the necessity of the case. But, even if the constitutionality of the law was the subject before the Court, where was the necessity of introducing Mr. ADAMS to the view of the public. Could Mr. ADAMS' incautious pledge to Mr. CANNING, the British Minister, influence the decision of a grave question? or was it necessary for Judge JOHNSON to justify to Carolina, the ways of the honorable Secretary? It must have been for one of these two purposes, or it was idle. But is the opinion of those in power to affect a constitutional decision, or is Mr. ADAMS so weak as to need Judge JOHNSON'S assistance, in regulating his official conduct? Is it not apparent, that every thing said in this opinion, relative to the correspondence between Mr. ADAMS and the British Minister, and between Mr. ADAMS and an honorable Member of Congress, is altogether irrevelant, and highly extra judical? Can any valuable end be accomplished, by such extraneous matter being introduced into a judicial decision; and must it not be productive of unhappy irritation, both here and abroad? Even allowing the law to be unconstitutional, would it not be the part of a wise man to *calm*, rather than to increase the excitement, which he thinks necessarily arises from the execution of such a law? If one State deems a certain act committed by another State, destructive of its safety, would not a man possessed of influence, be well employed, if he takes up the subject at all, in persuading the first State, to abstain from the committing of that act, although it would be constitutional; and would it not be extremely unsound and unpa-

triotic, to encourage a Northern State, in doing that, which is of little importance to her, but of deep solicitude, to us in the South? There can be but one opinion, I should conceive on this subject.

NO. 6.

As the Judge begins to be angry, and in a publication just put forth under his signature, would have the community to regard him as a noble stag pursued for some time past by blood hounds, upon whom he must now and then turn in the pursuit, I think it due to myself to state, in this place, that I am perfectly unconscious of any wrong motive towards him. My displeasure arises from the indiscretion of his publishing or causing to be published, his opinion on a subject, calculated to produce excitement, and containing sentiments injurious in their tendency to the public weal.—I am now tempted to go for the first time from the pamphlet; but when my readers shall perceive, that I do it for no other purpose, than to bring before them, the Judge's *own words*, and the sanction of *his own authority* for much that I have said, I trust I will be readily excused by all.—Though I travel out of the pamphlet, I certainly do not depart from the subject. The descision of Judge JOHNSON, in the case of Elkison, is a *nisi prius* decision. Lest some of my readers, should not know the meaning of the term, it behoves me to say, that by a *nisi prius* report or decision, is meant nothing more than a decision of a *single* Judge.

In the *City Gazette* of January 18th, 1822, is published Judge JOHNSON's opinion in the *Amanda*, and George Timmons, owner, and Edward G. Mann, master, vs. J. & J. Owens Johnson, *et. al.* In the course of the argument, in that case, before his honor, the case of De Lovio and Boit, reported in 2d Gallison, was much commented on. That report was a *nisi prius* one, and Judge JOHNSON, in noticing it, makes the following remarks—"I think it a *public mis-*"*fortune*, that they, (that is *nisi prius* decisions) are ever "*published*; for they commit a Judge to posterity, without "an opportunity of correcting his errors,—add to the enor-

"mous bulk and expense of a Law Library—often make "business for our Courts, which never would have originat- "ed otherwise—and finally, give a bias to legal opinions, "which ought to be received exclusively from tribunals of "the last resort." If ever discretion and good sense was contained in a few remarks, those I have here quoted, do certainly contain it. On a Judge's opinion are frequently suspended, the fortune and life of an individual; and, it is not too much to assert, "the destinies of a whole people." "To put forth, then, an opinion, which may contain errors fatal to our security, without an opportunity of correcting those errors, is, to say the least of it, highly injudicious. To make "*business for the Courts which would never have originated otherwise,*" is to create one of the greatest evils, which can afflict a people. "To give *a bias to legal opinions*, which ought to be received exclusively from tribunals of the last resort," is acting against the very genius and spirit of that constitution, which the Judge is sworn to defend, inasmuch as that constitution, has created a tribunal of the *last resort*, to prevent the very mischief complained of. How is it possible for any man, to reconcile the remarks of Judge JOHNSON, made only *eighteen months ago*, with his conduct on the present occasion? Are these remarks to be regarded only as just when applied to a *published decision* of so *distinguished* a Lawyer and Judge, as Judge STORY? or does Judge JOHNSON think his opinion *so infallible* that no errors can *possibly* be transmitted to posterity, by the publication of it? It may perhaps be said, that there is no apprehension of this decision, going down to posterity, or of its being added to our already enormous law libraries, which perhaps is true; still however, it may have the effect of making "*business for our Courts* which would *never have originated otherwise.*" The *Constitutional Court* of South Carolina, having refused to declare the Law unconstitutional, it was deemed unnecessary by captains of vessels, or their advisers, to make any further appeal to the State Tribunals, and as the Federal Circuit Court had no jurisdiction in cases arising under it, they would shortly have been compelled to employ white men only on board such vessels as traded to this port, and *thus* every benefit anticipated by the framers of the law of 1822, would have been realized. But since

Judge JOHNSON has thought proper to publish to the world, his opinion, on the constitutionality of this law, Captains of vessels are thereby encouraged, to bring into our ports, persons excluded by its provisions, and thus "*make business*" for our State Courts, with a view of carrying up their cases, as they are told they can, to the Supreme Court of the United States. Here then we perceive, that the very consequences, so *much deprecated by the Judge* when alluding to the *nisi prius* decision of a *Brother Judge.* are likely to result from his *own published* decision. If Judge JOHNSON could so clearly discern the evils flowing from the publica- of a *nisi prius* decision by Judge STORY, what, I ask, could have induced him to publish, or cause to be published, his own decision, which was also at *nisi prius ;* especially as he says in the case of the *Amanda*—"I have observed in com- "mon with my own decisions, that those of my brethren on Circuit, are not authority." Now, if 'not authority,' why publish it? It could not surely be '*to give a bias to legal opinion ;*' for I owe it to our State Judges to say, that they are not very likely to be biassed by any opinion of Judge JOHNSON, as to the construction of a law which is to guard against insurrections. Here then, is a tissue of inconsistencies in the conduct of Judge JOHNSON, totally irreconcileable, upon any principles I am acquainted with, though I candidly confess, I am not very conversant with the principles which prevail in the Federal Court. In my former numbers, I remarked that there was no necessity for Judge JOHNSON's saying a word on the constitutionality of the law, because he had other grounds fully sufficient to decide upon.—In truth, he did not possess the right to decide on its constitutionality, inasmuch as it did not, and could not affect the question before him. Can any good reason be assigned then, why he should have touched upon a question so irritating—so calculated to inflame—and so likely to produce a misunderstanding between the Northern and Southern States? Will it be said that he has done no more in this case, than he does in every case, and this excuse, I know has been made for him by his friends.—If this had been his *constant practice*, there were certainly strong reasons for his deviating from it in this instance. But so far from it being his constant practice, he *invariably avoids it*, at least if expressions made

use of by him are to carry any authority with them. In the conclusion of his opinion, in the case of the *Amanda*, he makes the following observations :—" There are other ques- " tions of great commercial importance in this case—but I " shall adhere to my *constant practice* of never seeking for " more than *one sufficient ground to decide upon.*" How comes it then, that after decreeing upon the very ground which *was* sufficient, he proceeds to consider a ground which he acknowledges to be insufficient? Is it not '*passing strange*' that upon the most delicate subject which can be presented to a Court, the Judge should not only comment upon a ground irrelevant and insufficient, but even depart from a resolution to which he *publicly promised to adhere*, viz. the '*constant practice* of *never seeking* for more than *one sufficient ground to decide on?*' Was there nothing due to the people of Charleston, among whom Judge JOHNSON was born, and to whom he is indebted for many honors? Would it not at least have been respectful to the people of South-Carolina, and to its Legislature, to have passed *sub silentio* a question, which was not necessary to the performance of his duty, but which must necessarily inflict a severe wound upon their sensibilities? Or are we to understand, that when a citizen becomes a servant of the General Government, he is to disregard the views, opinions and feelings of those among whom he was bred, and from whose early notice of him, he perhaps derives the exalted honor of being a Judge of the Supreme Court of the United States?

NO. 7.

ON that part of Judge JOHNSON's opinion, in which he condemns the State Act, as unconstitutional and void; I have hitherto said nothing. It was not my intention, when I began these essays, to touch this question. As the Act, however, has been much talked of, and, as many of our citizens might naturally fall into the opinion, that it is a nullity, merely, because a Judge of the United States' Court says so, and other good citizens know not what to think, I shall endeavor

to remove some doubts which I have heard expressed by my friends. It is not to be expected, that in the columns of a public journal, and with the little time allowed, from day to day, to prepare for the press, that I should give a systematic, or even the strongest view, of which the subject is susceptible. All that I propose to do in the numbers which are to follow, is to give some ideas on the subject, which, if they do not *wholly* satisfy my fellow-citizens, will, at any rate, induce some of them to *pause*, before they believe, that in passing this Act, the State has been unmindful of her obligations to the General Government, or has acted upon any other conviction than that the Act was constitutional as well as expedient. That it *will* stand the test if ever the great question should come before the tribunal of the last resort, is my honest conviction, as it is my sincere hope.

The Judge, in giving his extra-judicial opinion, takes two positions. His first is, that the right of Congress to regulate commerce with foreign nations, is a *paramount* and *exclusive* right. This general position, if it means that the regulation of commerce belongs exclusively to Congress, and not to the States, has my unqualified assent. I yield to the Judge that this law could not be passed by the State in the exercise of a *concurrent* right. The law in my view is wholly indefensible on such a ground; and I now regret that such a ground ever was taken. The words of the grant of this power from the States to Congress do certainly "sweep away the whole subject, and leave the States nothing to act upon." So far we do not differ.

The Judge's second general and broad position, is, that unless it can be shown that the State possesses a power *paramount* to the *treaty-making* power of the United States, expressly declared to be a part of the supreme legislative power of the land, the State law cannot be sustained. I here dissent. I think the case of HENRY ELKISON is independent of such a position, as not coming within the spirit or object of the treaty, or within the contemplation of those who negociated it, as I hope to shew. But I do contend, that *as to the prohibition of persons of color from entering its limits*, whether bond or *free*, this State does possess a power, which is paramount to any treaty-making power whatever, and that a treaty in which the State is deprived of

the exercise of this right, expressly or impliedly, is unconstitutional and void.

A treaty, made under the authority of the United States, is declared by the constitution to be the *supreme law* of the land.—Hence the idea, in many minds, of the *omnipotence* of a treaty. But this is a great error; for *all the laws* of Congress are equally the supreme law of the land. The same clause in the constitution which gives supremacy to a treaty, at the same time confers it on the constitution and on every act of Congress. But before either a treaty or a law can be acknowledged as supreme, it must conform, as I shall shew, to the constitution. The words are—"The *constitution* and the *laws* of the United States which shall be made *in pursuance thereof;* and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby." A treaty then, by being called supreme cannot violate the constitution, nor can it stand upon a better footing than an act of Congress; for, in the article just cited, the constitution itself is *first* declared supreme, as well as *every act* of Congress made in conformity to its provisions. The only difference between an act of Congress and a treaty, which I can perceive is, that the one may be repealed by the body which enacted it, whereas the other is not to be got rid of without collision with a foreign power. But I insist upon it, that a treaty as well as a law of Congress, before it can have validity to bind the States, must be *within the constitution.*

To give any other construction to this article in the constitution, would be to give the President and Senate, who constitute the treaty-making power, a right to do what they please, or to bind the States in all cases whatsoever. I should apprehend that no reasonable man would contend for such a construction as this. I will illustrate my position:—Suppose, in a treaty to be made by the President and Senate, the United States be pledged to an alliance *offensive* and *defensive* with France. Such a treaty would be *ipso facto* void. Why? Because it would give the President and Senate a power to *place* the United States in a *state of war*, which power, by the constitution, is *expressly* and *exclusively* vested in Congress. Suppose again, a treaty be made with

Great Britain, in which it should be stipulated, that for certain commercial advantages on our part, all her subjects, after a certain residence, should be entitled to all the immunities of native citizens. Such a treaty would be void, because *Congress alone* can naturalize foreigners. Let us take now a case as to the regulation of commerce, which so properly belongs to the treaty-making power. Suppose that in a treaty, purely commercial, in order to give the people of one portion of the Union advantages over those in another, a treaty shall be made with England, giving her subjects the right to import goods into some ports, upon trifling or no duties, but in others to be subject to very high or prohibitory duties, would not this treaty be unconstitutional and void, under that article of the constitution which says that "no *preference* shall be given by any regulation of commerce or revenue, to the ports of one State over those of another"—and as also infringing that other article which says that "imposts shall be *uniform* throughout the United States?"

These are cases in which treaties would be void, as infringing *express* articles or provisions in the constitution. But there might be stipulations in treaties which would be void, as interfering with the numerous undefined powers reserved to the States, such as a stipulation that a foreigner should carry on his trade free from all state-taxes, or that he should be exempt from militia or patrol duty, or that the estate of an intestate should be distributed according to the laws of the nation to which he belonged, and different from the law of the State in which he died, or that the vessels of any nation shall not be subject to the vexation of quarantine laws, and so on. If it were necessary to push examples further, many might be the cases (and some not improbable) in which a treaty make by the President and Senate would be void. Then I ask, as I trust I have a right to do, from what has been said, what becomes of this high sounding attribute, in the treaty-making power, that a treaty is the supreme law of the land, and that the Judges in every State must be bound by it, if it only be made under the authority of the General Government? What becomes of this *omnipotence* of a treaty, so much talked of? I have shewn many cases in which confessedly treaties would be void. A treaty, then, at last, as to its validity, is no more than an act of Congress.

Its validity depends upon its *constitutionality*. It must *not* interfere, either with the powers, *expressly* delegated by the States to other departments in the government, or with those which are, by the constitution, *reserved* to the States respectively. If it does, such a treaty in either case, is *ipso facto* void, and the States are no more bound by it than they can be bound by an act of the British Parliament.

NO. 8.

I AM fully aware, that it may be said, that, if a treaty be not regarded as paramount, and any state should refuse to comply with its stipulations, that it might furnish, as the Judge thinks, a ground of war between a foreign Prince, and the Government of the United States. I am also apprised of the fear entertained by many good people, that no Prince or State, would ever enter into a convention with a government, professing itself Sovereign and Supreme, whose engagements are liable to be frustrated by one of the members of the confederacy, and thus, to make the Government of the United States, like the old confederation, a rope of sand. The answer to these objections, I conceive to be very plain and easy, and it is this: if the General Government, which is a government acting under delegated powers, expressly defined, and under certain restrictions, and as such *is* known, or *ought to be known*, to every foreign Prince, or Potentate, thinks proper, in a treaty with such Prince, to enter into obligations, which are contrary to its high duties to the States, or to its obligations to the States, previously contracted, the *fault* and the *folly* is its own; and the matter must be settled between the two Governments, in the best way they can. It is no more, than the common case of an individual, treating with another individual, under powers, which are afterwards discovered to be insufficient. Governments often get into difficulties of various kinds, and there have been instances, in which differences and serious collisions too, have arisen between one government and another, owing to carelessness and oversight in their treaties. But it would be monstrous to say, that, because the general government, in a treaty, has sur-

rendered a right of vital importance, belonging to any of the States, that the particular State so injured, should, from respect to the Government, or from fear of involving it in collision and war, produced by its own indiscretion and folly, abstain from exercising a right, essential to its domestic tranquillity or existence. I will throw out an illustration, which I think not inapplicable. At this moment, slaves cannot be imported into the United States. Why? Congress has forbidden the importation of them under severe penalties. But suppose, from the sickliness of trade, from inclination, or interest, or any other cause, our brethren of the North, should desire the revival of the *slave trade*, once so profitable to them, and Congress should, under their influence, repeal its acts; and suppose, at the same time, that Wilberforce, and his party and influence, should be cast out of Parliament, and the trade should be opened to British subjects, and in this state of things, (stranger have happened) that a *commercial* treaty is entered into, between the two countries, (why do I say, entered into? One now exists;) in which slaves, (as much an acknowledged article of commerce, as broadcloths are) may, under the terms of the treaty, be permitted to be brought into our Southern ports. Is the Northern citizen, to insist on *his right* to bring them in, under the immunities he *expressly enjoys under the Constitution*, to carry his goods and chattels where he pleases? And is the British subject to point to the *treaty*, as establishing *his claim*? Are we to be told, that the treaty is the supreme law of the land, and that the treaty-making power, being rightfully exercised, in permitting an unlimited liberty of commerce, must be paramount? The idea is preposterous, that the sovereign State of South-Carolina, whose right, to open or shut her ports at pleasure, as to the importation of Africans, has always been exercised by her until 1808, when they were finally closed; should be precluded from shutting them again at any time when she shall conceive, that the further increase of a black population, already so large, shall endanger her domestic quiet. But I put aside all hypothetical views, and will proceed to consider a case which has existed in fact.

When the first treaty of commerce was made with Great-Britain in 1794, called Jay's Treaty, the port of Charleston, by a State Act, was then closed against the importation of

Africans, and so continued until 1808, when the law was repealed. In this treaty was inserted an article (the 14th) exactly similar to the one inserted in the present convention with that country. An *unlimited* liberty of commerce was *then*, as it is *now* stipulated for, and nearly in the same words. How is it, I ask, that Great-Britain, who was at that time carrying on the slave trade, did not insist upon bringing slaves into this port. Her right, under Jay's treaty, was clear and indubitable, and yet she never claimed the right. Now if she acquiesced in the State law, because she conceived the proviso at the end of this article, ("subject *always* as to what respects this article, to the laws and statutes of the *two countries* respectively,") to embrace the *laws of the individual states* as well as the laws of Congress, which is *not* Judge Johnson's construction; then, most clearly and unquestionably, *her* subjects who are persons of color, cannot now claim ingress, because the stipulated liberty of ingress for the purposes of commerce and navigation by the present convention, is fettered with the *same proviso*, and thus the State Act does not impugn the treaty. If, on the contrary, the British ministry or people thought that the true meaning of the proviso was, that the liberty of commerce was only subject to the laws of the United States, and not of a particular State, thus agreeing with Judge Johnson, and they still did not prefer their claim, because they thought that the regulation of a black or colored population, within the limits of South-Carolina, was a right which properly belonged to her, and therefore not within the meaning of the treaty, my present purpose is equally answered. Be all this as it may, one fact must stand forever undisputed, and a very important fact it is, namely, that in the history of the United States, a treaty was made with Great-Britain which directly contravened a law of the State of South-Carolina. In this treaty the rights of an unlimited commerce were clearly given to her subjects, and yet the law was in constant operation, and the right under the treaty was never insisted on. Who can suppose that Great-Britain, then so discreet, would not be equally so now, in not claiming ingress for her black subjects?

There is no better way of getting rid of any position, than to point out the absurd doctrines and consequences, to which

it may lead. I have done this I hope, by several familiar illustrations in this and the preeeding number. It is true that all these difficulties, and all this conflicting and clashing of powers and claims may be avoided, and, in the way suggested by the Judge, namely: that if policy requires arrangements to be made, which are considered essential to a particular State, that it be introduced into the Treaty, by those who negotiate it. This, however, is not considering the question. I am supposing, that the General Government, from carelessness, oversight, or some other cause, shall surrender expressly or impliedly, in a treaty, an *acknowledged* right of vital importance, to a particular State; such, for instance, as the right to shut her ports against slaves, or to regulate the ingress of any colored population, what then is to be done? The course is obvious to every reflecting man. Let the General Government extricate itself from a dilemma, occasioned by its own oversight or folly, in the best way it can, and let the State, whose acknowledged right has been improperly surrendered, and upon which its peace and existence depend, continue to exercise it, as if nothing had happened. Let her, in every such case, adhere to the rights reserved to her by the Constitution of the United States. Let her cling to them as the ark of her salvation.

NO. 9.

I HAVE established, I think, most satisfactorily, that a treaty, though called by the high-sounding name of the supreme law of the land, and to be received as such by all the Judges in the States, is on no better footing than an Act of Congress. That, to be binding on the States, or even on Congress itself, it is essential, that it be in pursuance of the Constitution—that its validity depends upon its constitutionality, and that no State is under an obligation, legal or moral, to comply with its stipulations, if it expressly surrenders a *State* right, or interfere with a subject exclusively of *State Legislation.* That it follows of consequence, that the treaty-making power, is not, as the Judge contends, a *paramount* power. I have shewn it, to be as restricted and as limited, as any

other power in the government, by supposing many cases, in which a treaty would be void, and by stating one case in particular, in the history of our country, in which it was clearly void. I have shewn in fact, that the Constitution alone is paramount.

From what has been said, in the preceding numbers, there arises this incontrovertible position, from which I cannot be driven, and I wish my readers to bear constantly in mind. It is this: That the President and Senate, who are the treaty making power under the Constitution, are (as affects the immediate question at issue) to be regarded in no other light, than as Delegates from the several States, to negotiate with Great Britain, a treaty of commerce, for their benefit, under the most general or enlarged powers, as to the subject matter, with an obligation on the part of the States, to *ratify* any convention, to be made in virtue of their powers.—And now comes the true question: can a stipulated liberty of ingress, for the purposes of commerce, be so construed, as to deprive one of those States, with a black population, from excluding free persons of color, who are British subjects. I think I put the question fully and fairly, for I fear not to meet it. It is idle, in any inquiry after truth, to look at things in their form and color only. Let us get at the substance of the transaction. Let us see how the President and Senate stand, as to their relations with the several States. When they are exercising the treaty-making power, are they not acting under delegated instructions from the States? Are they not Plenipotentiaries to all intents and purposes, and must not all their acts, or all treaties made by them, be subject to the same rules of interpretation, which would govern, if the power to make the treaty was delegated to one man only, or if it were a power from one individual to another. If this be the case, and the question be, whether a stipulated liberty of ingress, for mere purposes of commerce, shall be extended to apply to those, whom the State, giving the power, shall regard as dangerous to its safety, to a common mind, this question admits of an easy answer. Common reason would say to any man, that he, to whom a general power is delegated by another, no matter what the subject matter be, *cannot so use it*, as to bind his constituent, to do, or permit to be done, that which might be ruinous to him, and which, at the same time, neither of the parties, could in all human

probability have contemplated. The cases to this point in the books are numberless, and it is the constant practice of the courts of law and equity, to give relief in all such cases. The ground upon which relief is given, is unquestionably just. It is amongst the immutable principles of reason and of sound sense, and the stupendous structure of the *common* law, is but an improved system of reason and equity, founded in the very nature and fitness of things, that no man would *willingly confer* on another, a power to do any act, which, by *construction*, is to deprive him of an *essential* right, or to do him an essential harm. The rules which regulate the transactions of individuals, under general or special powers, are equally applicable to nations, in the interpretation of powers, from a Prince to his Ambassador or General, and in the interpretation of treaties between one sovereign state and another. All these subjects, as they relate to nations, have been fully treated by the writers on international law. *Grotius*, in treating of the interpretation of contracts, or conventions, or agreements, and public treaties, amongst many passages which might be cited, says, "Since it is impossible to [illegible] and specify every particular, there is a necessity for *reserving the liberty of exempting* such cases, as the party *would, were he present* himself, exempt, but this must not be done, without abundance of caution, and when there are sufficient tokens for it."—Lib. 2, chap. 16, sec. 26.

"One infallible token," says he, "that there ought to be an exemption, is, when to *adhere precisely to the letter*, would be unlawful, that is repugnant to the *laws of God or nature*, for there are *some things that are naturally exempted*, though they are in no wise comprised in the sense of the law."—*Ibid.*

"Another token of restriction is, when to *stick close to the letter*, is not absolutely, and of itself unlawful; but when upon *considering the thing with candour and impartiality*, it appears to be too *grievous and burthensome to be borne.*" *Ibid.*

Let it now be asked, my fellow-citizens, whether the negotiators of the present convention had in view, manumitted slaves of the West-Indies, as the seamen, who were to navigate the ships trading to South-Carolina. Was it possible for the American Commissioners to *foresee and specify* eve-

ry *accident*," and that there would so soon "*be a necessity for reserving the liberty of exempting the cases of black subjects.*"? Would not, "*the party herself*, (South-Carolina) who delegated the power to the President and Senate to make the treaty," would not she, "*had she been present*, have herself *exempted these cases?*"—Is it not "*adhering precisely to the letter*" of the instrument, to say that negroes were then contemplated as subjects? Amongst "*the things naturally exempted*, though they are *in no wise comprised in the sense of the law*," ought not colored subjects to be exempted, who are dangerous to the peace and quiet of the constituent in the treaty? Is not the extra judicial construction of Judge JOHNSON "*sticking*" (according to Grotius) "*too close* to the letter," and last of all, "*upon considering the thing with candour and impartiality*," does it not "*appear to be too grievous and burthensome to be borne*," *by the community of Charleston*, and of the State.

But it is impossible to look into Vattel, Grotius, and Pufendorf, without perceiving, from the general principles, laid down by them, that no public Ambassador, or General, however unlimited his power or instructions, can, in any treaty or contract for his sovereign, surrender a right, the exercise of which is essential to the safety of the state. If he does, the sovereign *is not bound to ratify the convention.* The reason is obvious. Self-preservation, as we all know, is laid down by the writers to be the first law of nature; and as it is "the just and rational application of the law of nature, or of its principles, to the affairs and conduct of Princes and States, which constitutes the particular science, called the Law of Nations," hence it necessarily also becomes a fundamental principle, in the law of nations, that a State never can surrender a right, the exercise of which is indispensable to its safety. It is a right inherent in every sovereign State; and it matters not, whether a State be in league or confederacy with others or not, or whether her sovereignty be entire or divided, she still possesses, according to every writer on international law, the right to protect herself. To deny this right to South-Carolina, who, at the first treaty of peace, was, and still is, a sovereign State, is to take from her that *first*, that *unalienable attribute*, which is the foundation of all sovereignty, and without which it is absurd

to say, sovereignty can possibly exist. I will not tire my readers (for I am writing plainly for the public, and not as a lawyer,) with long quotations from these writers. All lawyers who read this will know, that my principle is as clear as any which is known in the law of nations. I will cite but one passage—Vattel, in treating of the duties which nations and states owe to themselves, says—"A nation or state has a right to *every* thing which can secure it *from threatening danger*, and *to keep at a distance whatever is capable of causing its ruin;* and that, for the very same reason, that establishes its right to the things *necessary to its preservation*."—Vat. Lib. 1. ch. 2. sec. 20.

I put it now to any one to say, whether the evil, which the State law designs to avert, by forbidding the introduction of free negroes amongst our slaves, is not as much a "*threatening danger*" to the good people of South-Carolina, and will not be as much "*a cause of ruin*" to them, their families and their interests, "*if not kept at a distance*," as any danger, which could have been contemplated by this great scholar and civilian, when he wrote his immortal work. I do aver, that the free and uninterrupted ingress of a colored population into this State, from the North, and elsewhere, with their known habits, feelings and principles, animated and emboldened as they are, by the philanthropy of the day, and by the events, which Europe in its throes and convulsions casts upon mankind, is the most formidable evil, which South-Carolina has to look upon in these her days of apparent quiet. To permit such persons, with such principles, to have a footing on our soil, is to introduce a *moral* pestilence, which must destroy subordination in the slave, and with it the State itself. Am I to be asked to prove that which is, or ought to be, within the observation and experience of every intelligent inhabitant of the land? This would be unfair. Every one knows, that this is not an imaginary, but an actual evil. It is moreover an evil, which from its very nature, requires more precaution to avert, than any other. It is a moral contagion. It is the *Upas* tree, whose touch is death. It is not an open, but a *secret* enemy, deeply concealed in the thoughts, where no laws or police can reach him, and only appears as occasion requires. It is a pestilence, which walks in darkness, and a sickness which destroys in the noon-day. It is

an evil, which *comes from a distance*, slow and cautious in every step, stealing into our community, as a thief in the night. Insidious it is in every attack. It is *not* the bold dagger of the open assassin, which, ere it reaches the great fountain of life, some arm may be found happily to avert.—But it is *he*, who upon the secure hour, steals

> "With juice of *cursed hebenon* in a phial,
> And in the porches of the *ears doth pour*
> The *leperous* distilment; whose effect
> Holds such an *enmity with blood* of man,
> That swift as quicksilver, it courses through
> The natural gates and alleys of the body;
> And with a sudden vigor it doth posset
> And curd the thin and wholesome blood."

Is then, my fellow-citizens, the introduction of a colored population an evil, or is it not? What is it, but the juice of *cursed hebenon*, which the Abolition Societies of the North, and elsewhere, would pour into the porches of the ears of our domestics? Can any distilment be more *leperous*, than the principles which are embattled against our peace, and which these colored persons in ships, serve to communicate. I conceive there are none. They hold such an enmity with the *blood and wholesome* policy of the State, that it must *posset and curd*, and with a sudden vigor too, if the distilment be but *steadily poured* in the "*secure hour of our sleep.*"

This then is an evil, and it is an evil which must be kept at a distance. If it is permitted to steal upon us, it will introduce the poison, which, by its swift coursing through the natural gates and alleys of the body of the State, will

> ——————————"dispatch us all,
> Cut off in the blossoms of our sins;
> No reckoning made, but sent to our accounts,
> With all our imperfections on our heads.

NO. 10.

I TRUST, I have so far shewn, that the necessity for the State to take care of itself, is clear and obvious. But, says the Judge, if the *State* alone, is to judge of the necessity,

where is this to land us? Is it not asserting the right in each State, to throw off the Federal Constitution at its will and pleasure, and thus to make the Union a rope of sand? I answer, No. This does not necessarily follow. I contend, that this State *may* claim the right of judging, at what time and in what manner, she ought to exclude a foreign black population from her limits, and that she shall exercise this right, and yet the Union shall not be endangered, but the Constitution be yet preserved in its full vigor and beauty. It is, because the Judge *overlooks the inherent rights* of the individual States, expressly reserved to them by the Constitution, that he falls into this error. Who would ever think of taking up a question of this nature in the abstract? Must not that view be necessarily a limited and imperfect one, which would throw aside the *peculiar* circumstances, under which the Constitution of the United States was formed. This is a question *sui generis*, and to say, that it can receive a liberal and fair consideration, without adverting to those circumstances, and to the probable motives which must have influenced this State, in coming into the compact, is to maintain a wrong principle. It is the height of unfairness, to reason upon any abstract proposition, in an affair of this magnitude. Let us then advert to the situation, and the feelings of the States, when they formed our present happy Constitution.

Under the old Confederation, the States were desirous, that a more efficient form of government should be adopted. But there were difficulties, and "these difficulties were increased by a difference amongst the States, as to their situation, habits, and particular interests." All the States were anxious, that the general interest and safety should be better provided for; and yet, when the price or sacrifice came to be mentioned, which it was necessary for each to make, each State, as is natural, was desirous to retain as much of its sovereignty, as it could. What was to be done? Nothing (as the President of the Convention says) but for "each State to be *less rigid on points of inferior magnitude*, than might be expected, under other circumstances." As soon as this principle was acquiesced in and adhered to, the great work was finished; and the present Constitution was presented by General WASHINGTON, as President of the Convention, for the consideration and acceptance of the States, "as the result of

a *spirit of amity and mutual forbearance*, which the *peculiarity* of our political situation rendered indispensable."

This reference to the principles of compromise, which is the characteristic feature of our happy government, and which distinguishes it from every other, is very important to be noticed in this place; and it is still more important, to be assured, as we are, by the Convention itself, that the *great principle* upon which each State was *understood to act*, was, that it was "*not to be rigid* on points of *inferior* magnitude." It follows then, that on points of *vital* importance, they were *expected to be rigid*; and it could never be conceived, that upon a point of such magnitude to South-Carolina, as the regulation of a black population found within her limits, she could have been otherwise than rigid, if her right to be the sole and sovereign judge on this subject, had then been a matter of doubt. What was the situation of South-Carolina when she accepted this Constitution? To use a familiar phrase, lately introduced, she was a *slave-holding* State, a term by no means unappropriate to our present purpose. She was *then*, and is *now*, a State, whose prosperity and existence depends upon the labor of her slaves. From time immemorial, all her institutions, and her whole domestic polity and jurisprudence, have been founded upon the principle, that negroes and mulattoes in her land, whether *slave* or *free*, had no civil or political rights. That, as to the regulation of a colored population, she was, and ought to be, the best and only judge. She has not maintained this right at one time, and abandoned it at another; but in every political condition in which she has ever been placed, whether as a colony of Great Britain, as one of the old Confederation, or as a member of the late Federal Compact, she has invariably maintained, and adhered to this principle. *Her discretion alone*, has been the sovereign rule of her conduct. She opens her ports for the importation of Africans, and she shuts them again at her pleasure. She admits at one time, slaves and persons of color, to be brought from her Sister States, and she again prohibits, and again admits them. She excludes, by statute, slaves, and persons of color, bond and free, from the West-Indies, and the continent of America, and from all other parts. In her laws, all free colored persons are treated as if they were slaves; the one as much the subject of the negro

act as the other. Her right to do all this, was never questioned. When she goes into an Union of the States, she is in the full exercise and enjoyment of her inherent rights.—She carries with her, feelings and interests, certainly very different from those of her Sisters of the North; and though she might not be disposed to be rigid, as recommended by the Convention, on *minor* points, yet upon such a point, as the consideration of this subject involves, it would have been madness in her, not to have rejected the Constitution, as an insult to her understanding and feelings, and to have sought for some other alliance, whose friendship would not be death to her. If she did not at that day, make an express provision for the exercise of this power over blacks, which might come into her limits, it was because no man at that day doubted her right, or her power to exercise such a right. She did not then feel, that it would so soon become necessary, to exclude from her territory, even black seamen from abroad. There were then afloat no doctrines of African emancipation. If they existed at all, they existed only in the minds of a few pseudo-philanthrophists. These doctrines had not stalked abroad, as now, "shaking from their hair horrid pestilence." The *Abolition Society* of Philadelphia, the *British Association* in London, and the *Amis des Noirs* in Paris, had not then been formed. The National Assembly of France, had not yet promulgated their decree, to give privileges to their colored colonists, and the Abbe GREGOIRE had not written that celebrated letter, which was afterwards the torch, which lighted up the insurrection in St. Domingo Why do I say, that these things had not then happened? I forget the French Revolution itself. This memorable event, from which came licentiousness, as well as liberty—irreligion, atheism, and every species of madness, and every wrong principle of enthusiasm; this volcano, which vomited from its crater, every doctrine which was calculated to overturn all governments, and to unsettle the principles of obedience, and subordination in the minds of men, whether bond or free—this political *Vesuvius* was then quiet and harmless. Not even those who were peaceably cultivating their vineyards around its fertile borders, heard any rumbling or noises, which could portend the dreadful irruptions of fires, which so soon succeeded, and which have at intervals, continued to amaze

the nations. South-Carolina was then, unsuspicious, that it would be reserved for a Judge of the United States' Bench, from her own bosom, to be the first to volunteer an opinion, that in giving up the right of regulating her commerce, she ever intended, that commerce should be so regulated, as to have the blacks of the West-Indies and of the world, to be forced upon her against her will. Unsuspicious, however, as she was, of what was so soon to happen, it appears that she gave early proofs of her jealousy, lest State rights should be swallowed up in the Sovereignty of the General Government. As if fearful, that some interference with the Southern States, as to the regulation of her domestic policy, might be claimed under the Constitution, (though not exactly the one, now insisted upon in the case of ELKISON) South-Carolina was *amongst those States*, whose conventions at the time of their adopting the Constitution, were uneasy, and who "expressed a desire, in order to prevent misconstruction and abuse of its powers, that further declaratory and restrictive clauses should be added." It is here important to notice, that the eleventh article in the proposed amendments, which were submitted to the States, and which was afterwards adopted, came from the Convention of South-Carolina. It is in these words:—"The enumeration in the Constitution, of certain rights, *shall not be construed* to deny or disparage others, retained by the People."

The other amendment on the same subject is in these words:—"The powers *not delegated* to the United States, by the Constitution, *nor prohibited by it* to the States, are reserved to the *States respectively*, and to the *People*." The insertion of these two clauses in the Constitution, as if one was not sufficient, speaks volumes. Whilst these two amendments shew, that there were powers *reserved to the different States*, they establish, at the same time, most unequivocally and clearly, that the States are not to be deprived of inherent rights, or of sovereignty not actually surrendered, by mere *construction*, or *implication*. But Judge JOHNSON *would* deprive this State of her inherent rights, and *by implication*. According to his opinion, the right of South-Carolina, to exclude foreignf ree negroes from her limits, is destroyed by the implied powers of Congress. His position is, that to introduce black British subjects as seamen into our ports, is incident to navi-

gation and commerce, and that, as Congress alone can regulate commerce, she can regulate it in any way she pleases.—He kindly admits, that the black seamen may be confined to their ships, if it be considered dangerous for them to go abroad. This power, he thinks, may be lawfully exercised by his native State.

But where the army of constables is to come from, who are to confine those seamen on board; who is to pay them, and how communication is to be avoided, when the vessels are along side the wharves, and our own slaves are working on board, we are not informed.

> "Most excellent Judge,
> A Daniel come to judgment; Yea, a Daniel!
> You know the law, your exposition
> Hath been most sound---
> ——————Oh wise and upright Judge
> How much elder art thou than thy looks."

When the Judge comes to speak of the *black* merchants, or the *black* supercargoes, these he thinks have a right to occupy houses and warehouses in our city, for the purposes of commerce. The treaty limits no time, and he says, if we, the people of South-Carolina, dare to molest them, it is a declaration of war against Great Britain. His words are: "If our fears extend to the merchant, the supercargo, or master, being persons of color, I acknowledge, that as to them, the treaty *precludes us from abridging* their *right* to free ingress and egress, and occupying houses and warehouses for their commerce. As to *them*, this law is an *express* infraction of the treaty. No such law can be passed consistently with the treaty, and unless sanctioned by diplomatic arrangement, the passing of such a law, is *tantamount to a declaration of war.*"

Now, my fellow-citizens, around whose hearts are entwined every feeling which can bind you to your loved and native land, what is this but to assert, that the President and Senate of the United States have the indisputable right, so as to bind this State by treaty, as to admit the black subjects, merchants and traders of Great Britain (and she will probably have a few hundred thousand of them, if WILBERFORCE be not confined in a mad-house) into our State, and here to *reside* and remain as

merchants, (for the words of the treaty go thus far,) and that if the State of South-Carolina resists such an assumption of power as this, she violates her obligation to the United States. What is this, but to say, that if the people of the Northern States shall desire a commerce with the Emperor of Hayti, (and they are now complaining that they have not this trade) that the President and Senate may permit the brigands of St. Domingo to come here freely and securely with their cargoes, and that we must quietly and tamely submit, because this State gave up to Congress the right to regulate commerce. Under these few words "*shall regulate commerce*," a State right of greater magnitude, than any she has ever claimed, or exercised, is to be swallowed up in that tremendous gulph, the implied powers of Congress. So says Judge JOHNSON, in an extra judicial opinion, published to the world; published too, against a determination which he previously promulgated in a printed decision, that he never wished to see a *nisi prius* opinion of his in print. The amiable and *distinguished* Judge STORY's *nisi prius* reports ought not, in the mind of our Judge, to go down to posterity, until they are revised and confirmed by some tribunal of dernier resort. But every thing that comes from his extra judicial pen, no matter how hurtful to the public weal, is to be submitted to without further review.

> "Now in the name of all the Gods at once,
> Upon what meat doth this our Cæsar feed,
> That he is grown so great? Age, thou art sham'd,
> Rome, thou hast lost the breed of noble bloods---
> When went there by an age since the great flood,
> But it was fam'd, with more than with one man?
> When could they say, till now, that talk'd of Rome,
> That her wide walls encompass'd but ONE MAN!"

NO. 11.

I HAVE just adverted to the peculiar circumstances under which the Federal Compact was formed, which is now the happy bond of Union of all the States; and I hope I have satisfied many of my fellow-citizens, that South-Carolina, at

the time of her acceptance of the Constitution, did not intend to give up that essential part of sovereignty, which is indispensable to her internal safety; and that in particular, she never could have contemplated to abandon such a right, as that of regulating, at her discretion, any colored population which might come within her limits. To hear some persons speak on this subject, one would be led to suppose, that the State sovereignties were all merged in that of the General Government; that the powers retained by the States are unimportant and few; that they surrendered every essential attribute of sovereignty, and that they are now only exercising the duties, and acts of so many corporations. This certainly was not the opinion of those who framed the Constitution, and I trust, that I shall briefly shew, that it is not a correct opinion. Let us see, in the first place, what were the opinions of those, by whose influence the Constitution was made agreeable to the people at large. In the '*Federalist*,' which was a series of numbers, written by Hamilton, Jay, and Madison, for the purpose of removing the objections daily urged against the new Constitution, and which work has been permitted to be read as authority in our Courts, the authors, in discussing the supposed danger from the powers of the Union to the State Governments, say, "The State Governments may be regarded as constituent and *essential* parts of the Federal Government; whilst the latter is *no wise essential* to the operation or organization of the former. Without the intervention of the *State Legislatures*, the President of the United States *cannot be elected* at all, and the Senate is elected absolutely and exclusively by the State Legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures. Thus, each of the principal branches of the Federal Government, will owe its existence, more or less, to the favor of the *State Governments*. On the other side, the component parts of the State Governments, will, *in no instance be indebted* for their appointment to the direct agency of the Federal Government."—1 vol. Fed. 306.

Again—"The powers delegated by the Constitution to the Federal Government, are *few, and defined*. Those which

remain to the State Governments, are *numerous and indefined*. The former will be exercised on *external* objects, as war, peace, negotiation, and foreign commerce, with which last, the power of taxation will for the most part be connected. The powers reserved to the States, extend to *all the objects*, which in the ordinary course of affairs, concern the *lives*, *liberties*, and *properties* of the people, and the *internal order*, improvement, and prosperity of the State."—*Ibid*, 308.

There cannot, I think, be a more general and extensive power allowed to the States, as inherent rights, than those which might be enumerated, as coming within the meaning of these passages. If the powers reserved to the States, do extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties, and property of the inhabitants, and the internal order of the State, as is the opinion of these writers, I entreat any one of my readers, to point out an object, which has so ordinarily concerned the people of South-Carolina, as the regulation of a black population within her limits, whether bond or free. From the first settlement of the State, until the present period, the regulation of these people has been in the ordinary course of affairs, the principal subject of our polity and jurisprudence. The time is not in the memory of man, when these people were not the peculiar subjects of police regulations. But why should I place the question where it ought not to rest, namely, in the opinion of any sect of men? Let us see, how stands the question as to fact. Is South-Carolina at this moment an independent State? I answer, she is clearly so. How does this appear? I answer, she was independent when she came out of the Revolutionary War. This is proved, first, by the Declaration of Independence—"That these colonies are, and of right ought to be free, sovereign, and independent States," and by the recognition of this independence, in its fullest extent, by Great Britain, at the treaty of peace. Let us trace the history of the States to the confederation. We here find, in the second article of this compact—"That each State is acknowledged, to retain its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Their sovereignty and independence

then being indisputable, at these two periods, has any act been done, which has since deprived them of all sovereignty whatever? Did they give up all sovereignty by entering into the Federal compact? I should conceive not. "The people of the United States," says the historian of South-Carolina, "gave no new powers to their rulers, but only made a more judicious arrangement of what they had formerly ceded.—They enlarged the powers of the General Government, *not by taking from the People*, but from the *State* Legislatures." The sum and substance of all that passed at that day, between the People of the United States and their Governors, was simply this: We, the people of the respective States, finding it totally incompatible with the feelings, habits, opinions, and interests, which are so dissimilar in the different sections of our country, to unite ourselves in *one consolidated Government*, for every object, internal as well as external, are willing to unite for such external objects, as we all agree can be best promoted by union; and, to this end, we will confer any powers, or sovereignty, which may be necessary. But as to the regulation of our local interests and concerns, upon which there must be a perpetual difference of opinion, it is proper, that the power to regulate these, should remain where it is now lodged, that is, in the People of each State, who, as to all matters of State policy, shall be supreme: The Constitution of the United States, it must be remembered, resembles nothing in history, ancient or modern. It is not a league or confederacy, because in all confederacies, the acts of the federal head bear upon *States*, and not upon *individuals*. From the celebrated Achæan League, in which, for upwards of a century, the Grecian States confederated against their powerful neighbors, until the time of the Confederation of the American States, we find nothing, which, as to its spirit, principles, or form, can bear any thing like analogy to our own glorious Constitution. It is a Constitution, *sui generis*, adapted to a state of society and things, which never before did exist, and probably never will again occur in this world. It is an anomaly in the history of Governments. It is not a simple, but a compound government. It is federal, and it is consolidated. It is made up of so many small governments, all revolving round one great sovereignty, in each of which, the people are the fountain of all power, and each of which is

yet supreme, as to the purposes for which each was designed. The whole fabric is so tastefully wrought, so beautifully contrived, and the parts so admirably fitted and arranged, that whilst it forms a perfect union, "establishes justice, insures domestic tranquillity amongst the States, promotes the general welfare, and secures the blessings of liberty to all," it at the same time secures to each particular State, in which the people are again supreme, every right of sovereignty, which is necessary to be exercised for the internal order, prosperity, and safety of its inhabitants. Such is this stupendous work of human wisdom—the Constitution of the United States.

That the State sovereignties were not destroyed, but only limited by the new Constitution, appears to have been the sense of the Convention itself, who framed it. In the letter, which General WASHINGTON was directed to transmit to Congress, by the unanimous order of the Convention, there is this passage, "It is obviously impracticable in the Federal Government of these States, to secure *all* rights of *independent sovereignty* to each, and yet provide for the common interest and safety of all. Individuals entering into society, must give up a share of liberty, to preserve the rest."

This apology of the General Convention, that *all* the rights of sovereignty could not be preserved to the States, *implies most strongly*, that in their view, *many were retained.* In the same chapter of the '*Federalist*,' which I have already alluded to, there is the same admission. Although, in most of the examples of other confederacies, "the system has been so dissimilar from that under consideration, as greatly to weaken any influence concerning the latter, from the fate of the former; yet, as the States will retain, under the proposed Constitution, a *very extensive portion* of *active sovereignty*, the influence ought not to be wholly disregarded." From opinions, entitled to so much weight, and all of them expressed too, after the Constitution was finished, and before any amendments were proposed by the States; let us again recur to the two memorable amendments, already quoted in a former number. It is in these amendments, that the reserved power of the States is secured. This part of the Constitution, is the rock, upon which *each* State has deposited its *first*, and most valuable *right of self-government*, in matters which peculiarly concerned itself, and no other State.

I have dwelt upon this topic, because I have deemed it important to press it upon the minds of my readers, that the States are still free, sovereign, and independent, as to every object of internal polity and government, and that the principles, which, according to Vattel, apply to any independent State or Nation, as to the duty it owes itself, applies to South-Carolina, in the present question, in the fullest extent: and hence I establish, that, as by the law of nations, a nation has a right to do any thing for its self-preservation, so South-Carolina has the right to pass the law under which ELKISON has been arrested. But, whether she be sovereign, or whether she be not, it is certain, that among the powers reserved to the people, was the *inherent right* in every State, to take care of itself. That South-Carolina, therefore, in excluding from her limits a free colored population, is only exercising one of the many undefined powers, reserved to the States by the Constitution. There is one part of the Constitution, which I think very applicable to the present discussion. In the 4th section of the 4th article, it is provided, that the United States, as a matter of course, is to protect each State against *invasion;* but not against *domestic violence* in any State, until an application be made by the State Legislature, or by the Executive, if the Legislature cannot be convened. Here then it appears, that the putting down *domestic* violence, properly belongs to the States, and not to Congress. It is probable, that this stipulation was insisted on, with a view to the Southern States, those being the only States, in which a danger of this nature was most likely to occur. But how, I ask, is a State, to guard against domestic violence, if she is not to be the sole and sovereign judge, as to the means which are best adapted to that end. If the exclusion of a free colored population of other States, or Countries, be not one of the acknowledged means of warding off this species of danger, then there is no occasion to think, or talk, or write more on the subject. To lay us under an obligation of guarding against, or putting down domestic violence, and, at the same time, to deprive us of the precautionary means, which we, who are the best judges, shall deem proper to resort to, is to cast a reflection upon the great men who framed the Constitution, which they do not merit.

NO. 12.

THE Judge in his opinion says, that the power given to Congress by the Constitution, is "to regulate commerce with *foreign* nations, and among the several states, and with the Indian tribes;" and he triumphantly asks the question—"If Congress can regulate commerce, *what commerce can it not regulate?*" I have answered in my two first numbers, that they cannot so regulate commerce by treaty, as to interfere with the rights secured by the Constitution to any other branch in the government, or to the states respectively. I have specified some of the cases, in which such a treaty would be void, I now repeat it would be void, if the treaty were to permit foreigners, to import their goods into some ports on higher or smaller imposts, than others. It would be void if the treaty were to give any nation, the liberty of bringing slaves into our port. I think if in answering the Judge's question, I can name only *one* case, in which commerce cannot be regulated at pleasure, in a treaty, his triumph is at an end. I trust I have given two very satisfactory cases.

I now proceed to show, that the arrest of colored seamen in British ships is *not an interference* with the liberty of commerce granted by the treaty. The words of the Covention are, "There shall be between the United States of America, and all the territories of his Britannic Majesty in Europe, a reciprocal *liberty of commerce*. The inhabitants of the two countries respectively, shall have liberty, freely and securely to come with their ships and cargoes, to all such places, ports and rivers, in the territories aforesaid, to which *other foreigners are permitted* to come; to enter into the same, and to remain and reside, in any parts of the said territories respectively; also to hire and occupy houses, and ware-houses for the purposes of commerce; and generally the merchants and traders of each nation respectively, shall enjoy the most complete protection and security for their commerce, but *subject always* to the *laws* and statutes of the two countries respectively." The difference between this article, and that in Jay's treaty, is, that in the latter, a

liberty of "*commerce and navigation*" is agreed on, whilst in the present treaty, the word "*navigation*" is omitted. Another difference is, that in this treaty, the liberty of ingress is to those places only, to which *other foreigners are permitted to come.* In Jay's treaty the ingress is unlimited. In every other respect the sense of the two articles is the same.

Some persons may deem these differences to be immaterial. I however think otherwise. That both articles were before the commissioners is evident, from the words being the same, excepting, where by avoiding surplus words, improvement seemed necessary. What could be meant by the omission of the word "*navigation,*" in the present treaty? The Judge may say, that it was surplussage. But such is not the fact. Commerce and navigation, are nots ynonimous terms. The two words have definite, and at the same time distinct meanings. *Commerce* in its usual sense, is restricted to an intercourse between one nation and another, for the purpose of exchange of commodities. *Navigation* "is the *mode* by which vessels are to be conducted from one port to another, in the safest, shortest and most *commodious* way." *Navigation,* it is true, is incident to commercial relations so far, that commerce cannot be carried on without ships. But it may be easily conceived, that an unlimited liberty of commerce may be stipulated for, and yet an unlimited liberty of navigation not be intended. The intercouse by ships, is not to be conducted, so as to be altogether commodious to one party, and to the other, to be productive of inconvenience, which might, by some, be thought to be the case, where an unlimited liberty of navigation is stipulated for. But a general liberty of commerce, certainly gives no right to one party, to make the mode of navigating his vessels in a way very disagreeable to the other. It merely gives such rights of navigation, as are necessarily incident to commerce. Might not this have been the view, with which the alteration was made. There was certainly some reason for it, and the above is as probable, as any other which might be given.

Again: by the present treaty, all places, as to ingress, are excepted, which *to which other foreigners are not permitted to come.* This stipulation, as I have said, was not in the

old treaty. It may be said, that this means, that neither nation, should be permitted to trade with any port or colony of the other, from which foreigners generally are excluded—Admitted; but it also has another meaning, more definite than the above. It is, that a British inhabitant, shall come for the purpose of commerce, *to such places only* in the territory of the other, to which *other foreigners are permitted to come.* The words are, the *inhabitants* of the two countries respectively, shall have liberty to come," &c. In the clear sense of this article, the exclusion is confined to those who come *with* or *within* the ships. Now, if I can shew, that at the time of making this treaty, which was in 1815 (renewed in 1818) *South-Carolina* was *a place,* to which *no inhabitant of a foreign country could come,* if he were *but a free person of color;* then, most clearly, an inhabitant of England, *who is a man of color, cannot be* admitted; for the treaty, only gives *British inhabitants ingress* where foreigners generally have ingress. By an act, then, of this state, passed on the 20th December, 1800, which is fifteen years before the present treaty, it is declared, that it shall not be lawful for any free negro, or mulatto, to enter into the state, after the passage of the act, by land or by water, under pain of being sold as a slave. This act was made perpetual by the act of the 17th December, 1803, and it is now in force, excepting by an act of December 1820, an exception was made as to seamen. The act of 1822, takes off again the exception as to seamen, and varies the mode by which such persons are to be dealt with, who do enter the state; but it does not interfere further with the act of 1820. Thus, then, it appears, that the exclusion of *all foreign persons of color* from South-Carolina, excludes within the strict sense and meaning of the treaty, *British people of color,* for they can be admitted only, where others are admitted. The Judge may say, this is taking the treaty in its strictest sense. I would ask, which construction is most rational, that which I have just given, or the construction of Judge JOHNSON, that under the power of Congress to "*regulate commerce,*" she may give the right by treaty, to any nation, to fill our land with free negroes, mulattoes and mestizoes, from all parts of the world?

I will not dwell longer upon these two topics, but proceed to my first position, in this number, namely: that the ex-

clusion of colored seamen, is not an interference with commerce, within the meaning of those who made the treaty. I think no proposition can be more clear, than, that a liberty of commerce in a treaty does not give one nation, a right so to conduct it, as to endanger the peace, and quiet of the other. All that is meant by a liberty of commerce, is, that it is to be the subject to no *unnecessary*, or *capricious* restraint. There must be no such serious molestation or hindrance, as will deprive the party, of any of the substantial benefits of the trade. It this moment occurs to me, that in Jay's treaty, the liberty was, to come with their ships and cargoes, "*without molestation or hindrance*," which words, seem to be omitted, in the present convention, as through abundant caution. But, be this as it may, nothing else, is certainly meant, by a liberty of commerce, than that it should be carried on without *unnecessary* restraint. To say otherwise, would be to furnish nations, with causes of war, every day in the year, and to the British particularly, a cause of war would arise, whenever our quarantine regulations are enforced against their vessels. These are restraints, not imposed by the general government, but by the *States*.— Though by an Act of Congress, the President, is authorized, to order the revenue officers, and officers commanding forts, and revenue cutters, to aid in the execution of quarantine and health laws of the State; yet this circumstance, does not make those laws, the acts of the general government: but admit, that the detaining of a vessel under the guns of *our Fort Johnson*, is a government act; yet surely, imprisonment in the state prison at New-York, on a charge of felony, under their health laws, or the recovery of heavy penalties under our act, for a violation of these laws, is not an act of the general government. These are the local regulations of the two States. The idea, that a liberty of commerce gives one party a right to carry it on as he pleases, without consulting the convenience of the other party, is absurd. All restraints, which are indispensable to the quiet and good order of the place, in which it is carried on, must be submitted to. If British ships were navigated, entirely, by persons of color, then as this would be a very serious restraint upon the commerce, to take away her seamen, there might be some ground to say, that this was an interference with com-

merce, *within the meaning* of the treaty. But when, not one in one hundred of her seamen, is black, to forbid the ingress of these few, is not denying to her, a liberty of commerce, within the meaning of the convention. If no interruptions of any kind, are ever to be offered to trade, the stipulations of treaties, never have been, nor ever will be performed. Violations must daily take place in the enforcement, as I have said, of the health laws of the different States. This is sometimes so serious an interruption to commerce, that voyages by them are often broken up, and merchants ruined. Yet, as it is not a capricious, but a necessary restraint, to prevent cities from being scourged by pestilence, the treaty thereby is not violated. If then Great Britain, submits to the health laws of the States, which sometimes ruin her merchants, because she feels it a restraint, *necessarily enforced, will* she, or *can she* call that an *unlawful* hindrance, which would guard the State from insurrection, or domestic violence. Is there any comparison between the two cases? Here a cook, or steward, is taken from a vessel, and there is not by this act, more inconvenience, than if the same men, were confined by sickness, during her stay in port. But in New-York, if on the arrival of a vessel from abroad, it is discovered, that during her voyage, a man has died on board of fever, she is adjudged an infected vessel, her cargo which perhaps is perishable, is landed, fumigated and placed in warehouses, the captain and crew confined to their own narrow limits in the ship, or within the quarantine bounds; the vessel is detained thirty or forty days, and the voyage completely frustrated and ruined. Now upon what principle of reasoning is it, that the law of South-Carolina is to be regarded by Great Britain as an interruption to the commerce she stipulated for in the treaty, and the health laws of New-York are to be acquiesced in? Both of these stand upon the same footing. They are both local, and state regulations. It would puzzle any one to give me the answer. The state Act, then is not such an interference with the liberty of commerce given by the convention, as amounts to a violation of the treaty on the part of this government. The commerce of Great Britain is still uninterrupted and enjoyed to its fullest extent. Not one bale less of Manchester goods, or one crate less of

crockery-ware comes into the United States in consequence of the operation of the state Law. The shipping interests of Great Britain are not affected by the regulations we have adopted to secure the quiet of the State. If ever these essays should come under the eye of the Honorable Mr. Canning, the present Premier of England, I am confident he will smile, at Judge Johnson's kind apprehensions, lest the two countries should be embroiled in war, by the arrest of *Elkison*. What a thought! That such a country as Great Britain, at whose helm, always stand the first of her Statesmen, and which is united to us by so many ties of kindred, religion, laws, language and interest, should go to war, for the sake of a few black cooks and stewards. Thanks be to Heaven, that Mr Canning understands the interests of Great Britain rather better, than our Judge Johnson does those of South-Carolina, his native state.

No. 13.

I HAVE shewed that the arrest of Elkison was not an interference with commerce, within the meaning of those who made the treaty. I shall now briefly, and lastly, maintain that the state act, does not interfere with the power given by the states to Congress to regulate commerce. As to what constitutes the regulation of commerce, no two merchants could possibly differ about it. The regulations of commerce, embrace, as I conceive, every arrangement, as to the articles to be imported or exported, or as to duties and imposts, or tonnage to be paid, or as to the preference of trade with this, or that port or colony; now crippling one branch of foreign trade by high or prohibitory duties, and now encouraging another by light impositions, or by no imposts, and so on. These are the regulations of foreign commerce; and these only were in the contemplation of the states, when they gave up to the general government, the regulation of trade. The want of some proper and uniform system, on which to build commercial regulations for the states, was one of the first evils felt by the people after the war. Under the confederation, different states laid on different imposts and tonnage,

and when restrictions were resorted to abroad, there was no retaliating effectually by counter regulations. The consequence was, that there was a general decline of trade and public credit in the states. If there be a fact which stands undisputed in the history of the United States, it is this fact, and I appeal to every historian for the truth of it: That the want of uniformity as to imposts and tonnage in the different states, was the principal inducement for the states to form a new constitution. The states were at different times called upon to "enlarge the powers of the confederation, and to entrust them with the regulation of commerce even for a limited number of years." But as some complied with the call, and others fettered their grants with improper conditions, a uniform system could never even be formed or agreed on. It is believed by most people, that could there have been only uniformity as to the regulations of trade, under the old confederation, our present happy constitution had not been formed. Who then can believe that when the great object of all, was to correct an evil, which at that day distressed and perplexed the people more than any thing else, namely the want of concert among the states, on this subject, and of uniformity in their imposts and tonnage, that it was ever intended that the right to admit a class of people, dangerous to a particular state, was ever included, as amongst the regulations of commerce.—All that was intended by the surrender of this right to Congress, was, neither more, nor less, than that some common head should so regulate the general trade of the country, that the sufferings which the people experienced from the obstructions which foreign nations offered to their trade, might be at an end, and that they might thereafter avail themselves of their natural advantages. Have not all these ends been answered by the new constitution, and is it not absurd to say, that because a black or mulatto seaman, here and there is taken from a foreign ship, and confined in jail till she leaves the port, that this state disputes with Congress the power to regulate commerce? And yet absurd as such an idea is, it is nevertheless the extra-judicial idea of Judge Johnson.

There is but one more topic which I deem worthy of notice: It is that part of the commercial convention which states that the reciprocal liberty of commerce shall be "sub-

ject always to the laws and statutes of the two countries respectively." The Judge's construction is, that it refers to the laws of the *United States*, and not to those of the *individual* states. I however, deny this construction as irrational. I cannot believe, that the negotiators intended that the ingress for the purposes of commerce, should be in violation of the local or municipal laws in the states. As they knew, or ought to have known, that there were regulations in the different states which imposed some restraints upon commerce, namely their health laws in particular; it is more probable that they meant local laws, than any other. The convenience of commerce in every part of the globe, is made to bend to the police or municipal regulations of all sea-ports.

How is it, in a commercial contract, between one man and another? Is not reference always had to the usage of trade, and the particular usage is made as much a part of the contract, as if it had been expressed in so many words? So it is in all treaties between nations. Municipal regulations which are established in the different ports, of the parties, are as much to be respected, as if express provision were made in the convention, that they should not be put aside. If municipal or local laws were in the views of the parties, certainly then the laws of the states are principally embraced in the proviso, for Congress have no municipal regulations, except in the District of Columbia.—The acquiescence of Great Britain under Jay's treaty from 1793 to 1804, in not bringing slaves into this port, when, by that treaty, she had the right, is conclusive, that she did not think a treaty paramount to a local state law.

I will now transcribe some passages from Vattel, which though they properly belong to some of my previous numbers, may, nevertheless, be useful even now. In treating of the collision of laws and treaties, Vattel says, "When laws and treaties happen to be opposed to each other, the following rules ought to prevail. We will not speak of the collision *of the law of nature;* this will, doubtless, *in all cases*, have the advantage, *and must prevail.* But where there are laws and treaties opposed to each other, and it is impossible to fulfil both, the following rules are to be observed:

1. In all cases where what is *permitted*, is found incompatible with what is *prescribed*, this *last* has the advantage: for

a mere permission imposes no obligation;—to do or not to do what is permitted, is left to our will; we may do it, or we may not do it, as we please. But we have not the same liberty with respect to what is *prescribed by law.*— We are bound, or obliged to do it.

2. In the same manner the *treaty* which *permits*, ought to yield to the *law which forbids.* For the prohibition should be obeyed.

3. Every thing being otherwise equal, the *law* or treaty which *ordains*, yields to the *law* or treaty which *forbids.*

4. What will suffer no delay, ought to be *preferred* to what may be done at another time; for this is a method of reconciling every thing, and fulfilling both obligations.

5. When two duties are found incompatible, the most considerable or *urgent* merits the *preference.* This rule is so plain that it needs no proof: this is the grand rule in their opposition as it merits most attention.—*Vattel, Book 2d. chap.* 17. *Sec.* 311 *to* 319.

I have now given my ideas as to the constitutionality of the State Act, to the best of my abilities, and I trust that many of my readers will be satisfied with the remarks I have submitted. Such as are not wholly satisfied, I must entreat, not to infer from any supposed failure on my part, that the subject is not susceptible of stronger and better views. But above all, I entreat them not to believe, that I rely solely on the few last positions which I have taken. The great ground upon which the State Act is to be sustained is, that if the treaty with Great Britain can be so construed as to give her colored seamen from abroad, a right to enter this port, contrary to the will of our Legislature, such a treaty interferes with the most important of all the inherent rights secured and reserved to her by the Constitution of the United States, and is therefore absolutely null and void. When the question which involves all that is dear or valuable to this State, comes to be discussed before the Supreme Tribunal of the Union, by men far more competent than the writer of these numbers, let us my fellow-citizens, hope and trust, that notwithstanding one Judge from our State has unnecessarily prejudged the question, that the decision will still be for South-Carolina.

As to Judge JOHNSON—if he thinks that these numbers are written from jealousy of him, or from malice, or any bad motive, he is *exactly in the error* into which he so often *precipitates* himself in his newspaper controversies. *Caroliniensis* is not ashamed of his motives. He regards the Judge as a person who may hurt this State seriously, if he is not made to feel *smartly* every time he assails the public. As to the feelings of this writer, they are strong against him—but they are the *highly indignant*, as he trusts they ought to be, the *honest* feelings of every man who loves the land and the laws which protect him.—Had Judge JOHNSON not injured the State, *Caroliniensis* had never written. Had Judge JOHNSON entered into the sensibilities of his fellow men, in the time of their inquietude, and there

> ——" Have garner'd up his heart
> Where—either he must live or bear no life,
> The fountain from the which, his current runs, or else
> dries up,"

this opinion of his, probably, had not been given, and these essays had not appeared. But when, against all advice,* he will put forth a publication which serves only to encourage the colored population of the north to persevere in coming here, contrary to our safety, or to furnish pretexts for unprincipled Editors to vilify the South; when his opinions so unnecessarily, nay wilfully obtruded upon the public, can only be used in the other States.

> ——" As a cistern for foul toads,
> To knot and gender in! Turn thy complexion there,
> Patience,"

and say whether this is to be submitted to without a murmur. Scarcely fourteen months have elapsed since Judge JOHNSON, by his celebrated anonymous essay " on the effects of popular excitement," held up his native State to the greatest possible odium. There was then a simultaneous burst of indignation against the man, who could write such an essay, and the printer, to avoid the weight of obloquy which was fast accumulating upon him, gave up Judge JOHNSON as the author.—The impression that was then made never can be effaced from our memories. Can any excuse be made for him who publishes what must disgrace his own country abroad?

* Even ELKISON's Counsel used his influence (in vain) to dissuade the Judge from publishing his opinion.

A second time he comes forward, and he reflects upon the country, by his perverted views of our legislation and proceedings. His opinion is on the wings of the four winds, to injure the character of the State. The poison of this compound of oblique views, and of extra-judicial mis-statements, is now swiftly coursing its way from Georgia to New-Hampshire, and from the Atlantic to the Missouri.

> "Such soon speeding geer
> As will disperse itself through all the veins of this
> great Confederacy."

Every feeling which jealousy can awaken, or affected philanthropy inspire, will be brought to bear, or is now bearing, upon the character of our Legislature. Obloquy and reproach have already been our portion abroad. The Judge will have abundant proofs of this, by referring to the columns of some of the Northern journals. He will there see the blessed fruits of this opinion, so indiscreetly promulgated. He will there find how seriously the reputation of his country is affected in the view of those who triumphantly quote it.

> "O shame! the thought consumes me,
> To see a man like this,
> Borne on our shoulders to his present fame."

To see him at such a moment as this, step out as the *voluntary champion* against our *inherent rights*, nay, the rights and the interests of his fellow-townsmen. Could I ever build up a reputation for myself, that could place me upon the Bench of the United States; could I but fill such a large space in the eye of my fellow-citizens, *clarum et venerabile nomen!* could I but believe, that I had "assiduously labored to rear the pyramid of my country's glory, or could I boast of some forty winters as spent in the service of the people," next to the consciousness of having supported the dignity of my station, and that I had never done an act which could cause the dilapidation of mine own honors: next to these would I value beyond all treasure, the confidence and the love of my fellow-townsmen and countrymen. What could avail all my honors, if I could not live an unstained husband to my sweet country's sympathies.

I have now done: and if Judge JOHNSON will hereafter keep his sentiments on late occurrences to himself, and not trouble the public with them, neither he nor the public shall ever again hear from CAROLINIENSIS.

PHILO-CAROLINIENSIS.

SINCE the foregoing Numbers were put to press, it has been thought adviseable to add the following, as having a very important bearing on the subject.

Philo-Carolinensis.

NO. 1.

PHILONIMUS admits, that the State Act of 1822, is constitutional, so far as it affects Northern seamen, but denies the same efficacy to the Act, when British seamen are concerned. Surely, this said *Philonimus*, in the extension of his philanthropy, must be disposed to concede to the British nation, what is expressly denied by that nation to our own citizens, or the citizens of other countries. In June, 1822, the Alien Bill was revived by Parliament. Sir JAMES MACKINTOSH, in opposing that Bill, objected to the power exercised by Parliament, of sending foreigners out of the country; but in spite of the arguments, sarcasm and eloquence of Sir JAMES, the Bill was passed by a large majority. Mr. PLUNKET, who defended the provisions of the Bill, confidently asserted, that "the power of removing aliens from the country, was one, which had always existed. It was founded upon the right of nations, and had been exercised by the government of every nation, whether free, or despotic." "The question, of sending an alien out of a country, was only a question of right and fitness." "Government should always have the power to remove foreigners, should they become obnoxious; the more particularly, as there were numbers of foreign emissaries here, who sought to poison the public mind, and to sow disaffection." "He would ask, were not

the means then resorted to, necessary for the preservation of the country?" What measures could be adopted, if this country were to become the resort of the pestilence of other countries? "The object of the Alien Act was to provide, that the Government of the country, if it found, that the residence of foreigners was dangerous to the peace and tranquillity of the country, might be empowered to remove them, although they might not be charged with the commission of any specific crime." "The prerogative of the crown, in this country, and in every other, no matter whether free, or not, had, he apprehended, always exercised that power."

"This, said Mr. PLUNKET, was not giving up the Constitution, or giving up freedom—for the same Constitution that had given us liberty, had given us the power of preserving it. The more free our Constitution was, and the more unrivalled our privileges, so much the more necessary it was, to guard and protect both."

By these numerous extracts, we are taught the sentiments of the British government on this subject, and can it be true, that this very government would take offence, at our acting upon principles, here broadly laid down by their own ministers, or may it not happen, that the proud and haughty government of the "far-famed Isles," may deny to the American States, what it is so resolved to arrogate to itself. It appears, that on the debate before the House of Commons, Sir JAMES MACKINTOSH had used arguments drawn from extreme cases, similar to those used by Judge JOHNSON, when he refers to Lascars and Nantucket Indians. This, says Mr. PLUNKET, "is another mistake, into which the gentleman has fallen—he has stated imaginable mischief, which might arise from extreme cases, and has argued upon those imaginable mischiefs, as though they had been the end and object of the Act." It occurs to me as extremely improbable, that the British Ministry should even make a formal representation to the United States Government on this subject. Elevated as that nation conceives itself above all the powers of the earth, it scarcely can conceive us so poor, so spiritless, as to submit to be chided, for acting upon the very principles they so openly proclaim.

NO. 2.

To my first number, it may be replied, there is no doubt, the Parliament of Great Britain, or the Congress of the United States, have a right to pass an Alien Bill, but the same power is not vested in our State Legislature—to this I answer :—That in the year 1800, our Legislature passed a Bill, prohibiting masters of vessels from bringing into this State, any free persons of color. In 1803, our ports were opened to the importation of slaves, but the provisions of the Act of 1800, so far as respects free colored persons, were rendered perpetual; the reasons for which, are familiar to every one acquainted with the history of those times. St. Domingo was in possession of the negroes, and of course those negroes were free. Some of them had gone over to France for education, and were disposed to claim the same privileges as the European whites—to mingle in our commerce, navigate vessels, and settle among the people of these States for the purposes of trade; one of the principal chiefs, had some years previously, visited this very State, on his return from France—and a few years afterwards, a vessel, officered and manned by black people, arrived at Hartford, in the State of Connecticut. Among the officers, was Boyer, now President of Hayti, a smart, sagacious, and intelligent fellow, well skilled to devise any scheme, or perpetrate any mischief. The Southern members in Congress, aware of our danger, from the introduction of this class of persons, succeeded in procuring the passage of the following Law, by the United States Legislature :—

The Act is entitled, "an Act to prevent the importations of certain persons, into certain States, when, by the Laws thereof, their admission is prohibited;" and passed February, 1813.

Section 1. "*Be it enacted*, by the Senate and House of Representatives of the United States of America, in Congress assembled, That from, and after the first day of April next, no master, or captain of any ship, or vessel, or any other

person, shall import, or bring, or cause to be imported, or brought, any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope, into any port, or place, of the United States, which port, or place, shall be situated in any State, which by Law has prohibited, or shall prohibit, the admission or importation of such negro, mulatto, or other person of color; and, if any captain, or master, aforesaid, or any other person, shall import, or bring, or cause to be imported, or brought into any of the ports, or places, aforesaid, any of the persons, whose admission or importation is prohibited, as aforesaid, he shall forfeit and pay, the sum of one thousand dollars, for each and every negro, mulatto, or other person of color, aforesaid, brought, or imported, as aforesaid: to be sued for, and recovered by action of debt, in any Court of the United States, *provided always*, that nothing contained in this Act, shall be construed to prohibit the admission of In. dians."—3d vol. Laws of the U. States, 529.

By this Act of Congress, all State Laws, which shall prohibit the bringing of colored persons into the State, except natives, citizens, or registered seamen of the United States, or seamen, natives of countries beyond the Cape of Good Hope, or Indians, are made Laws of the United States.— When, therefore, the Treaty of Commerce, between this country and Great Britain, subjects all the provisions of that treaty, to the Laws and Statutes of the two countries, it subjects it to the State Law; because the State Law is made a Law of the United States; so that the States may pass Alien Bills, so far as colored aliens are the subjects of those Bills. It will also be perceived, that ELKISON has no right to come into this State, by virtue of the Treaty, for ELKISON being a British seaman, and British seamen not coming under the exceptions in the Act of Congress, he is of course excluded by that Act, which applies to European and West-India colored seamen, as not being natives of countries beyond the Cape of Good Hope. It will also be perceived, that this Act could not have intended to apply to slaves, for two reasons. 1st. It excepts natives, citizens, and registered seamen of the United States, natives of countries beyond the Cape of Good Hope, and these are never slaves. 2d. Because all the Slave

* until 1808, but no longer.

Acts, speak of persons brought into the States for sale, and this Act makes no mention of such. How then can it be pretended, that this State has no right to prohibit the bringing in persons of color from foreign countries? How can men dare to assert, that the constitutionality of our Law of 1822, cannot bear an argument? Who is so rash, as not to pause, before he advocates doctrines subversive of the rights of the State, and destructive of the property and lives of us all.

NO. 3.

PHILONIMUS has conceded, that the Act of Congress, passed in 1803, does sanction, not only existing, but future laws of the State, excluding colored seamen of the description of ELKISON; but denies, that the State Act of 1822, is constitutional, inasmuch, as being passed subsequent to the treaty, it of course must yield to the treaty.

It will be recollected, that the words of the treaty are—"That the liberty of ingress, for the purpose of commerce, shall be subject *always*, to the Laws and Statutes of the two countries respectively"—*now*, that these words relate to future, as well as to Laws existing at the time of the treaty, Philonimus himself admits, for in one of the numbers, in answer to "*Caroliniensis*," we find the following expressions: "What doubt can be entertained, that the *contracting parties* to the Commercial Convention, *have retained* the right, to pass what Navigation Laws they please. The only obligation they have laid themselves under, is, to extend to each other all the advantages of the most favored nation."—Thus it is fully conceded, that the United States, as one of the contracting parties, could pass any navigation laws subsequent to the treaty without any violation of the treaty; but throughout the whole of Judge Johnson's opinion, it is taken for granted, that the regulation of seamen is a regulation of commerce and navigation; the conclusion is, therefore, irresistible, that the United States can regulate the admission of British seamen without in the least infringing upon the treaty. "Does it follow from this," says *Philonimus*, "that the

States shall have the power to pass navigation laws for the two contracting parties? to impose upon them *a rule as to the seamen they shall employ.*" Here we find two positions are distinctly yielded, by *Philonimus.*

1st. That the United States can pass future navigation laws, without violating the treaty.

2dly. That a law regulating seamen is a navigation law; the inference then is irresistible; that if the State law of 1822, had been passed by Congress it would not have infringed upon the treaty of 1818.

Now I ask whether the Act of 1822 is not made an Act of Congress by the United States law of 1803? and if it *be so*, must it not be conceded, that its passage by our Legislature, is not a violation of the treaty of commerce between Great Britain and the United States? And that *it is so* Philonimus has already admitted, in his answer to my first and second number, in which he grants that "the Act of Congress relied on does sanction, not only existing but *future* laws of the State, excluding colored seamen of the description of Elkison."

The whole of the argument may be summed up thus—

1st. The United States may pass navigation laws without infringing the treaty.

A law regulating seamen is a navigation law. Therefore, the United States can regulate seamen, without infringing the treaty.

2d. The State Act of 1822, regulating seamen, is, by act of Congress, made an United States law; but seamen may be regulated by an United States law, without infringing the treaty. Therefore, the State Act of 1822, is not an infringement of the treaty.

As truth is my aim, I have endeavoured to exclude from this argument whatever was calculated to mislead myself or my readers; and unless I have misquoted from former numbers of *Philonimus*, my conclusion is a legitimate deduction from undisputed premises. Never to go beyond the case presented, is a rule which I have long endeavoured to act upon, and as the one before the public is that of a British seamen, it is unnecessary to consider the operation of the Act of Congress of 1803, upon Northern seamen, it is only necessary to remark, that a law of Congress may confer upon

a State a right not previously possessed, but never can divest a State of inherent or pre-existing rights. Neither can the opinion of Congress, respecting our right to exclude northern seamen, be gathered from the Act of 1803; for the object of that Act was to make it obligatory on the United States revenue officers to assist the State in executing the law, so far as it respects British seamen, though it might not have been willing to assist in executing any laws interfering with those from the north. Animated, and protracted, and vexatious, have been the discussions on the constitutionality of our State law; much has been written, which can have no other interest but what is derived from the excitement of the moment—much, that will cease to be remembered, when the summer is ended, and the winter braced us up once more for active employments; but, after all, it must be confessed, that from so much collision, light has been struck, and truth revealed.

PHILO-CAROLINIENSIS.

The act of 1803 did recognize the State Laws admitting Slaves - But this act was passed in aid of the 9th sect. 1st Art. U.S. Const. by which those Laws were restricted in their Duration to the year 1808, or rather the U.S. by that art were enabled at that time to prohibit what until then the States had a right to admit - They have exercised that right - & the Law of 1803 is expired - and the authority of the States over the subject, being under this art. of the Constitution an express exception to the power of Congress to regulate commerce, ends at the time limited 1808 -

A Southerner.

A VERY important Act of Congress has been brought before the public eye by *Philo-Caroliniensis*, which, it seems had not been noticed in the discussion of ELKISON's case. The new view afforded by the discovery of this Act of Congress is to my mind, conclusive; and I beg to call the attention of my fellow-citizens particularly to it. Elkison's claim is founded, as the Judge has decided, upon our treaty with Great Britain. To this claim it was (amongst other grounds) objected that by the treaty itself, its provisions were to be subject to the municipal laws of the States. The reply of the opposite counsel was, that the laws embraced by the proviso in the treaty, were *not the municipal*, or *local* laws of the States, but simply the laws of Congress. The Judge himself, could not then doubt, but that if Congress had passed an *alien* bill, that the provisions in the treaty, must be subject to such a bill. At this moment, notwithstanding this treaty gives to every American the right of going to and of residing in Great Britain for the purposes of commerce, the government there under their act of Parliament of last year, can order off any of our citizens without any trial, and forbid their return under pain of death or transportation to the South Seas. In doing this Judge JOHNSON could not pretend to say, that England violates the treaty, because the treaty itself is made subject to the laws and statutes of the two countries. Upon the same principle, if the United States should interdict the negroes or mulattoes of the British territories from coming into our ports, our engagements would not thereby be violated. In both instances, both countries would act precisely on the same principle of exclusion, all such cases falling within the clear intent and meaning of the *proviso* in the treaty.

The Judge himself, was so certain that there was no Act of Congress which could possibly bear upon ELKISON, that he uses these words : " Now, according to the *laws* and treaties of the United States, it was both lawful for this seaman to come into this port in this vessel and for the captain to bring him in the capacity of a seaman." But his Honor was greatly in error, for there was a law of the United States which prohibited ELKISON from coming in any capacity whatever.

In February 1803 an Act of Congress was passed, the first section of which is in these words: " From and after the first day of April next, no master of any ship or vessel, shall import or *bring* any negro, *mulatto* or other person of color (not being a *native*, a *citizen*, or *registered seaman* of the United States, or seamen *natives* of countries *beyond the Cape of Good-Hope)* into any port or place of the United States, which port or place shall be situated, in any State, which by law has prohibited, or *shall prohibit*, the *admission* of such negro, mulatto or person of color," &c. Thus stands the act of Congress, the obvious design of which is to give effect to the State Laws on the subject. Is there then any law of this State which at present prohibits colored seamen from coming into its limits? The answer is given by Judge JOHNSON himself in his opinion. All his reasoning, nay his whole opinion, is built upon his declaration, that the State Act is a *prohibition to all intents and purposes.*— His words are " that it amounts to the assertion of the power to *exclude the seamen of the territories of Great Britain*, or any other nation whatsoever." Again, " in its *present form* it amounts to an *actual exclusion.*" It is again also said for the Judge by *Philonimus*, that " the Act of Congress of 1803, relied on, *does sanction*, not only existing, but *future* laws of the State, excluding colored seamen of the description of ELKISON ; the words being, has prohibited, or *shall prohibit* ; thereby *giving the State Act of* 1822 *force as to all colored seamen*, not expressly exempted."— Here then we have an express acknowledgment, first by the Judge *in propria persona*, that the State law of 1822, is a *prohibitory* law, and then in *Philonimus*, that this Act is *sanctioned* or recognised by Congress.

The State Act of 1822 being thus recognised, and made the Act of Congress, and ELKISON not being one of the persons excepted in the Act of 1803, (the exception therein contained, relating only to *Northern* seamen, and seamen beyond the Cape of Good Hope) let us now see how the Judge and *Philonimus* are to get over the difficulties into which such an acknowledgment involves them. *Philonimus* gravely tells us, that the treaty was made before the State law. His words are, "still, however, even in ELKISON's case, and that of British seamen generally, the question under the treaty remains. The ground was *unoccupied by the State law* at the time of the British treaty of 1818. It was *occupied* by that treaty, when the State law was passed, and a spirit of moderation would point out the propriety of abstaining from the practical application of our construction of the *proviso* (in the treaty) until the two governments can come to an understanding upon it." The reasoning then, of *Philonimus* is neither more nor less than this—The treaty is only to be subject to such laws of the two countries, as existed at the *time of its date* or ratification. But this is a subterfuge unworthy to be resorted to by a man pretending to law knowlege. What are the words of the proviso? They are, that liberty of ingress, for the purposes of commerce, "shall be subject *always* to the laws and statutes of the two countries respectively" What is the obvious meaning of the word "ALWAYS?" At *that* time is it, or at *all times?* The meaning is clear and indubitable. It is to be constantly or perpetually, that is, during the continuance of the treaty, subject to the laws of the two countries. Whatever question might arise under the treaty, its provisions at the time of such question occurring, must be subject to the existing laws of the two contracting parties. But had the word "always" been omitted, such would be the fair and liberal construction. Could Great Britain pretend to contend for a contrary interpretation? If she did, what would become of her *alien* law that she passed last year, since this treaty was signed. Could she complain of an act of our Legislature, sanctioned and made the law of the United States, which is in nature of an alien act, when she herself had enacted one, infinitely more severe and penal. Which, I ask, is the most penal? For a *white bona fide citizen* of the United States, to incur

the penalty of death or transportation as a convict for 7 or 14 years, to the South Seas, if he dares to return to England, after being once warned to depart the kingdom; or, for a mulatto seaman, to be sold under our act; If the captain refuses to take him away, or he himself does not quit the State, after regular notice to that effect. But the inconsistency of *Philonimus* is glaringly displayed in his answer to *Philo-Caroliniensis*. It now suits his purpose to say, that the laws which existed at the time of the treaty, are the only laws embraced in the proviso. But he did not hesitate to say the reverse of this in his other numbers. By his number 9, in his answer to that part of *Caroliniensis*, in which C. maintains, that the rights of navigation by the treaty, could not give to one party, the right so to navigate his vessels, as to make it inconvenient or dangerous to the other, *Philonimus* expressly answers in these words:— "What doubt can be entertained, that the *contracting parties* to the commercial convention, *have retained* the right to pass *what navigation* laws they please. The only obligation, they have laid themselves under, is to extend to each other, all the advantages of the most favored nation. Does it follow from this, that the *States* shall have power to pass navigation laws for them both? To impose upon them a *rule as to the Seamen they shall employ?*"

Is not this, I ask, an indubitable concession, that though the *States* could not pass navigation laws, or impose upon Great Britain *a rule as to the seamen she should employ;* yet, that either of the *coutracting* parties to the treaty could do so as to the other. Does not *Philonimus* say, *totidem verbis*, that both parties *retain* the right to pass what navigation laws they please; and does not Judge JOHNSON regard the regulation of seamen as incident to navigation and commerce. Have not the United States exercised the right of imposing upon Great Britain, a rule that she is not to bring her colored seamen into our Southern ports? Has it not been exercised in the State Act of 1822, which Act *Philonimus* acknowledges to be the law of the United States against all colored persons who do not fall within the exceptions under the law of the United States. And does he regard *Elkison* as an exception upon any other ground, than that the treaty happened to be made before the State Act

was passed, which ground I have shewn from his own words fails from under him.

All this has *Philonimus* conceded. But let us not forget, that this concession was made, when he and the Judge were ignorant of the Act of Congress of 1803. Had *Philonimus* then known that the *State law of* 1822, was at the moment of his writing the above passages, *the law of the United States pro tanto*, he, probably, would not have made this confession. Now, which of *Philonimus's* assertions shall we take? His *first* position, that both parties notwithstanding the treaty, retained the right to pass what navigation laws they pleased, without infringing its stipulations; or his *present* assertion, that the treaty is to be subject to no laws but those which existed at its date. Shall we infer with him in his No. 9, that the right of ingress given by the treaty, does not hinder the United States from imposing what rule they please as to the seamen which England shall not bring into our ports; or shall we now take his present counsel, to abstain from the practical application of *our* construction of the proviso until the two governments can come to an understanding upon it? Men who write much, ought to have very long memories.

But some persons have said, that this Act of Congress of 1803, is a two edged sword—It cuts both ways. If it interdicts the admission of ELKISON, it, at the same time admits Northern negroes into our ports, and the admission of these last is the greater evil of the two. The answer is this: Congress does not by the Act in question, confer on the native and registered seamen of the United States, a *positive right* or privilege to come into our ports against our will, nor can any such right fairly be implied. *Philonimus* it may be seen has taken up this idea, from the questions which he puts. "Why, says he, was the Act of Congress necessary, if the State possessed the power without it? or how could the United States *discriminate* if the State power was unlimited?" I will answer: The Act of Congress bears no such construction. Congress would not attempt to pass any such Act. The design of the Act was simply, to aid the States in doing that which Congress approved of. The power of Congress to pass a law concurrent with a State authority, may be undisputed, but it does not follow that the

same body could pass an Act to have a contrary operation.— This State, for instance, can prohibit slaves from being imported from Africa, and may pass an Act with severe penalties on the subject. So can Congress prohibit the importation, in any way and by any penalties it pleases. Congress has done so in fact. But yet Congress would not have the power to permit the introduction of slaves, if we should choose to shut our ports. So it is, with the two Acts in question. The State, at a time, when she alone had the power to shut or open her ports, chooses that no free negroes or slaves shall be brought within its limits. Congress approving of such a determination, and knowing that if offenders should escape detection from the State authorities, yet they probably might not elude the authority or vigilance of the revenue officers of the United States, also in 1803, passes its law. The design is to aid the State in enforcing its acts. But as the laws of some of the States might exclude all persons of color indiscriminately, (as does the State of South-Carolina) whether natives of the Northern States or not, it was very natural for Congress *in its act* to discriminate. It was simply and plainly using towards our own particular State this language. "We approve of the general object of your laws, and as we are interested as well as yourselves in limiting the evil of slavery, and of a free colored population, we will go hand in hand with you; but there are some parts of *your excluding act* which we cannot approve of, and these parts we cannot introduce *into our act*, to be passed on the same subject. We are willing to impose heavy penalties upon captains of vessels for bringing into your ports slaves, or some of the free persons of color whom you would exclude as dangerous to yourselves; but as to the native or registered seamen of the Northern States, we cannot think of giving you *our aid in the exclusion of these.* It would not become us, who represent the interest and feelings of the Nothern, as well as the Southern sections of the Union, to pass or recognize any such an act, nor could we include seamen beyond the Cape of Good Hope. As to all others, free negroes or persons of color, British, French, or otherwise, from the West Indies or elsewhere, we will aid you to the utmost of our power, by imposing a penalty upon the captain, or by a seizure of the vessel. But as to the

Northern seamen, whom *we wish to except in our act*, we shall not use United States authority as against these." How easy it is to explain what at first seems to be attended with difficulty. Is it not perceived that the Act of Congress gives no right to Northern seamen to come here, but, merely refuses to recognize or lend its aid to enforce that part of the State law which would exclude them. The act is nothing more than an act of courtesy, voluntarily tendered by the General Government, to such States as they thought might need the vigilance of the United States, vessels and civil officers, to give greater effect to their laws on this subject. As to the Lascars and Judge JOHNSON's fine Nantucket seamen,* who of course are included in the exception to the Act of Congress, these, never were subject to any of our laws against persons of color.

That part of Judge JOHNSON's opinion in which he extra-judicially considers an East-Indian or Nantucket Indian, or a free Moor, as a *person of color*, within the meaning of our act against persons of color, is palpably erroneous. Both principle and practice are opposed to it. A few days ago, a man of color who arrived from New-York in the *Franklin*, was taken into custody. He no sooner produced an official certificate from our Court, that he was born of a free Indian woman, than he was instantly discharged by the deputy sheriff. How delightful it must be to every friend of South-Carolina, to find that the more this subject is discussed, the higher is the ground upon which our rights are to be placed. The whole ear of the United States, has it is true, been most rankly abused. But let us not despair. Our brethren at the North, when they come to see the whole ground occupied by us, will not be disposed to blame us for what we have done.

* The Nantucket Indian Seamen, whom the Judge in his opinion calls the finest in our service, are not to be found. The Nantucket Editor tells us that there is only one Indian in the Island of Nantucket, containing 8000 souls.

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